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The *Mississippi Law Journal* is published four times annually in March, June, September, and December. Editorial and business offices: *Mississippi Law Journal*, Post Office Box 849, University, Mississippi 38677.

Current subscription: $18.00 per year. Single issue: $5.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

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Second class postage paid at University, Mississippi 38677 and additional mailing offices.

Citations conform to A Uniform System of Citation (13th ed. 1981).

The *Mississippi Law Journal* is a member of the National Conference of Law Reviews.

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(Required by 39 U.S.C. 3685)

1A. TITLE OF PUBLICATION	1B. PUBLICATION NO.	2. DATE OF FILING
MISSISSIPPI LAW JOURNAL	0 0 2 6 6 2 8 0	9/25/85
3. FREQUENCY OF ISSUE	3A. NO. OF ISSUES PUBLISHED ANNUALLY	3B. ANNUAL SUBSCRIPTION PRICE
QUARTERLY	4	$18.00

4. COMPLETE MAILING ADDRESS OF KNOWN OFFICE OF PUBLICATION *(Street, City, County, State and ZIP+4 Code) (Not printers)*

POST OFFICE BOX 849, UNIVERSITY, MISSISSIPPI 38677, LAFAYETTE COUNTY

5. COMPLETE MAILING ADDRESS OF THE HEADQUARTERS OF GENERAL BUSINESS OFFICES OF THE PUBLISHER *(Not printer)*

SAME AS ITEM 4

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MISSISSIPPI LAW JOURNAL, BOX 849, UNIVERSITY, MS 38677

EDITOR *(Name and Complete Mailing Address)*

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Mississippi Law Journal

Published by Students at the University of Mississippi School of Law

VOLUME 54 SEPT.-DEC. 1984 NUMBERS 3&4

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RELIANCE ON STATE CONSTITUTIONS: SOME RANDOM THOUGHTS

*Ronald K.L. Collins**

> It is particularly desirable, at a time when the role of state governments is depreciated and is left to be defended by men of dubious motives, that we investigate further how states' rights contribute to freedom.
>
> —George Anastaplo
> THE CONSTITUTIONALIST[1]

Some years ago an assistant attorney general in Michigan declared that if he were "empowered with authority to fix curriculum in American law schools, one of the required courses would be a study of state constitutions."[2] Today, when the sheer volume of federal constitutional decisions is nearly overwhelming,

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This article is an expanded and revised version of an earlier work that appeared in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (B. McGraw ed. 1985), a collection of speeches delivered at the 1984 National Conference of Chief Justices meeting in Williamsburg, Virginia. Permission for use of this material has been granted by West Publishing Company.

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[1] G. ANASTAPLO, THE CONSTITUTIONALIST 176 (1971)(footnote omitted). In this respect, Professor Anastaplo has also observed that "[m]any of the problems with state governments could be easily handled by a people determined to do so—by a people that appreciates that unless the states fashion their constitutions in response to the problems of today, more and more power will inevitably go to Washington." *Id.* at 603 n.17.

Professor Anastaplo has further noted that the solution is not simply, or even primarily, one of fashioning state constitutions to meet current abuses by state governments. For the most part, many of these abuses can be corrected by farsighted statutory or administrative measures. As for state constitutions, the central need is to develop a greater recognition of their functional importance. This is not to deny, however, that a number of state constitutions are in need of thoughtful revision, including the kind that would produce shorter documents. *Id.* at 603-04 & n.17. *See generally* Howard, *Constitutional Revision: Virginia and the Nation,* 9 U. RICH. L. REV. 1, 45-48 (1974)(setting forth merits of state constitutional revision).

[2] Faville, *Dissecting a Constitution,* 13 WAYNE L. REV. 549, 549 (1967).

we might be relieved that the man from Michigan never acquired the authority he imagined. After all, some may ask: "Why do we need *more* constitutional law?"

The simple answer, of course, is that we already have "more." That is, we already have one federal Constitution *and* fifty state constitutions. Unfortunately, where constitutional law[3] is concerned, the state of the law has had relatively little to do with the law of the states. But it is as much a puzzle as a pun that today the bar and bench make a "federal case" out of so many questions that could be resolved under state law. Even so, for both practical[4] and principled reasons,[5] past litigation habits are changing and state constitutions are enjoying renewed interest as sources of protection for individual rights. Since 1970 state high courts have handed down more than 250 published opinions holding that the constitutional minimums announced by the United States Supreme Court interpreting the federal Constitution are insufficient to satisfy the more stringent requirements of state law.[6] With increasing regularity, this renewed interest in state law is finding expression in many state courthouses across the nation. Whether the subject is freedom of expression,[7] equality of treatment,[8] economic due process,[9] crim-

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[3] All references to constitutions, unless otherwise noted, refer to the various individual rights guarantees contained in the declarations or bills of rights found in state constitutions. Of course, much of state constitutional law is concerned with the structure of state and local government, a matter of exclusive state competence. These remarks, however, focus on constitutional protection of individual rights, a function of the state charters as well as of the federal Constitution.

[4] *See infra* text accompanying note 14.

[5] *See infra* notes 53-78.

[6] *See* Collins, *Rebirth of Reliance on State Charters*, Nat'l L.J., Mar. 12, 1984, at 29-30 (collecting cases). While state law may afford greater protection for individual rights than the federal Constitution requires, it is axiomatic that when the elaborated state doctrine is applied so as to be more restrictive of individual rights, the federal constitutional requirement takes precedence. *See also* Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984)(state law may be less protective than federal law provided federal Constitution is honored).

Similarity between my views on this subject and those of Justice Hans Linde of the Oregon Supreme Court may be owing in part to the fact that I clerked for the Judge during 1980-81.

[7] *See, e.g.*, Wilson v. Superior Court, 13 Cal. 3d 652, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 474-75 (1975)(state constitution provided more definitive protection for freedom of speech and press than federal Constitution); State v. Robertson, 293 Or. 402, 649

inal procedure,[10] or the right to bear arms,[11] state constitutions

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P.2d 569, 576-77 (1982)(coercion statute restricting freedom of speech must not be overbroad or exceed state constitutional limits); Wheeler v. Green, 286 Or. 99, 593 P.2d 777, 788-89 (1979)(state constitution prohibited award of punitive damages in defamation suit); State v. Coe, 101 Wash. 2d 364, 679 P.2d 353, 359 (1984)(right of media to broadcast copies of court tape recordings upheld on state constitutional grounds); State v. Beno, 116 Wis. 2d 122, 341 N.W.2d 668, 674 (1984)(state supreme court not bound by United States Supreme Court's construction of speech and debate clause of United States Constitution in interpreting similar clause of state constitution). For two views on state constitutions and freedom of expression, see Simon, *Independent But Inadequate: State Constitutions & Protection of Freedom of Expression*, 33 U. KAN. L. REV. 305 (1985); Utter, *The Right to Speak, Write & Publish Freely*, 8 U. PUGET SOUND L. REV. 157 (1985).

[8] *See, e.g.*, Dupree v. Alma School Dist., 279 Ark. 340, 651 S.W.2d 90, 92-93 (1983)(equal protection clause in state constitution applicable to system of financing schools); Sail'er Inn v. Kirby, 5 Cal. 3d 1, 8, 485 P.2d 529, 533, 95 Cal. Rptr. 329, 333 (1971)(state constitution prohibits gender discrimination in hiring); Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 653 P.2d 970, 977-78 (1982)(state constitutional guarantee of equality of privileges and immunities generally prohibits gender discrimination). The Supreme Courts of California and Oregon have applied a "strict scrutiny" standard of review in equality of treatment cases.

See also People v. Marcy, 628 P.2d 69, 74 (Colo. 1981)(state equal protection standard requires that statutory classification of crimes be reasonably related to state interests); State v. Freeland, 295 Or. 367, 667 P.2d 509, 512 (1982)(state equality of treatment analysis requires scrutiny of whether application of law grants or denies privileges to individuals without legitimate reasons related to individual situations). *See generally* Williams, *Equality and State Constitutional Law* in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 71 (B. McGraw ed. 1985).

[9] *See, e.g.*, Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions*, 48 TENN. L. REV. 241, 269 (1981)(Tennessee courts have invalidated on state substantive due process grounds state economic regulations that are otherwise valid under federal Constitution); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 98 (1950)(price-fixing statutes declared unconstitutional as violating both federal and state constitution due process clauses); Comment, *Rediscovering Means Analysis in State Economic Substantive Due Process:* Mount Royal Towers, Inc. v. Alabama Board of Health, 34 ALA. L. REV. 161, 172 (1983)(Alabama Supreme Court employed combination of ends and means analysis in applying new test for substantive due process); *see also* Chill v. Mississippi Hosp. Reimbursement Comm., 429 So. 2d 574, 584 (Miss. 1983)(state can recover treatment expenses from mental patient's estate provided state constitutional substantive due process rights of patient were not violated).

[10] *See, e.g.*, Blue v. State, 558 P.2d 636, 641 (Alaska 1977)(right to counsel under state constitution given broader application than parallel right under federal Constitution); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 758-60, 148 Cal. Rptr. 890, 901-03 (1978)(implied right to impartial jury under state constitution violated by use of peremptory challenges to exclude jurors solely on basis of group bias); Huihui v. Shimoda, 64 Hawaii 527, 644 P.2d 968, 978 (1982)(statute prohibiting bail for entire class of accused persons violated state constitutional right to due process); State v. Davis, 295 Or.

are being dusted off and studied. To some extent, this fresh concern with state law has been spawned by new developments in the decisional law announced by the United States Supreme Court.[12] Indeed, given the emerging prominence of state constitutional law, it is only a matter of time before questions of inadequacy of counsel or legal malpractice will arise in situations where counsel fail to rely upon relevant state constitutional law.[13] As Justice Hans Linde has observed: "A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice."[14]

Quite apart from the practical reasons that give rise to reliance on state constitutional law, there are a number of jurispru-

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227, 666 P.2d 802, 812 (1982)(state law basis for exclusionary rule); Holland v. State, 91 Wis. 2d 134, 280 N.W.2d 288, 290 (1979)(state constitution guaranteed right to jury trial and unanimous verdict). For a more complete listing of cases, see Collins, *supra* note 6 at 29.

[11] *See, e.g.*, State v. Blocker, 291 Or. 255, 630 P.2d 824, 826 (1981)(right of citizen to possess billy club in public protected by state constitutional right to bear arms); State v. Kessler, 289 Or. 359, 614 P.2d 94, 100 (1980)(right to possession of billy club in home protected by state constitutional right to bear arms). *See generally* Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U.L. REV. 177, 192-93 (1982)(state constitutions guarantee citizens right to bear arms, equip militia, and provide personal defense).

[12] *See, e.g.*, Paul v. Davis, 425 U.S. 693, 698 (1976)(holding that claim should have been brought under state defamation law, not as right to privacy claim under fourteenth amendment); Rizzo v. Goode, 423 U.S. 362, 380 (1976)(federal injunction concerning state agency's internal affairs departs from principles of federalism). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977)(discussion of various Court decisions restricting access to federal courts and effect on state court adjudication).

Wisconsin Supreme Court Justice Shirley Abrahamson, among others, has emphasized a concern for improving the adjudicatory process as the primary reason for reliance on state constitutions. *See* Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 962-63 (1982)(suggesting that process of interpreting individual rights should clearly explicate differences between state and federal rationale).

See also Barbash, *State Courts Expanding Individuals' Rights*, Wash. Post, April 2, 1984, at A1, col. 2 & A4, col. 3 (noting that new reliance on state law is, in some states, a reaction to Supreme Court decisions).

[13] *See* State v. Lowry, 295 Or. 337, 667 P.2d 996, 1013 (1983)("Any defense lawyer who fails to raise [a state constitutional claim] and relies solely on parallel provisions under the federal Constitution, except to exert federal limitations, should be guilty of legal malpractice.")(Jones, J., concurring).

[14] Welsh & Collins, *Taking State Constitutions Seriously*, 14 THE CENTER MAGAZINE 6, 12 (Sept./Oct. 1981).

dential reasons for consulting state law in advance of its federal counterpart. Perhaps foremost among these is that giving full initial consideration to state constitutional law claims lends certainty to state law and provides a greater opportunity for state courts to develop a more rational and complete state constitutional doctrine. Too frequently, however, these considerations are obscured by selective, typically result-oriented, invocations of the state constitution.[15] Fortunately, however, principled as

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[15] *See* Collins, *Reliance on State Constitutions: Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 3-5 (1981). By this, I mean the unfortunate practice whereby lawyers and judges do not look to state law as a matter of course in individual rights cases, but employ it only on those occasions when it will produce a particular result that is unobtainable under federal law. At the time I wrote the *Hastings Constitutional Law Quarterly* commentary, I employed, for purposes of emphasis, the term "reactionary" to describe the unprincipled use of state law to circumvent contrary federal law decisions announced by the United States Supreme Court. Upon reflection I have decided that the term "reactive" is preferable.

I have described elsewhere some of the shortcomings of this approach:

> [I]n far too many instances, especially where criminal justice issues are involved, the regular practice is to start with the federal cases. To the extent that the state constitution is ever invoked by the parties, it is frequently done as an afterthought, a mere appendage to federal claims. This makes your job as state judges all the more laborious. Additionally, there will be times when counsel will want you to make selective use of the state constitution in order to secure some right being asserted. Though I firmly advocate initial, and when possible full, reliance on state law, including reliance on the state constitution, I think you do yourself a disservice when you make random use of that law. Such use smacks of non-principled, result-oriented decision-making. I do not say that selective use of the state constitution is always such, but only that it may appear to be so. A state court's invocation of the law contained in its own constitution should not be selective in a way that leads the public and the profession to believe that its presence automatically favors any one class of litigants. Phrased differently, there are still both winners and losers where state law is concerned.

R. Collins, Remarks at the National Conference of Chief Justices, Williamsburg, Va., Mar. 10, 1984.

These remarks were directed to state appellate judges, primarily those sitting on the state high courts. My point was not that state courts should decline to hear state law claims simply because counsel may have invoked them to avoid adverse federal law. Obviously, where counsel raises any such claim, a court is obligated by law at least to consider its merits. Still, the reviewing court should *itself* avoid selective use of state law and should require counsel to argue relevant state law no matter what federal law provides. *See infra* notes 55, 69-72 and accompanying text.

There are signs that Justices William Brennan and Thurgood Marshall may have already aligned themselves with those who favor interstitial or even reactive reliance on state law. In the past several Terms they typically avoided any suggestion that state law

well as practical considerations are now producing a more neutral, law-based, process of adjudication. Further, these considerations point to a conception of state government not realized since the adoption of the fourteenth amendment or the application of the national Bill of Rights to the states. It is a form of government in which the people of the states retain unto themselves "certain rights"[16] beyond those found in the federal Constitution, and which recognizes on the basis of its own law the limits on its own power.

State judges were the first to employ judicial review in defense of civil liberties—even before the judicial tenure of John Marshall.[17] As state courts reassert their proper role in our fed-

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should be consulted antecedent to federal law claims. Rather, their view appears to be that state law should be invoked only where federal law does not provide the relief sought. In such cases, so the argument runs, state law may be employed to obtain the result desired and preclude subsequent federal review as well. If there is no hostile federal precedent, and if federal law is invoked by a state court, then the Supreme Court may review the case. Should the Court reverse that decision, then the Brennan-Marshall view would generally counsel state judges to invoke state law to reinstate their original ruling. Perhaps this may help to explain their reason for not joining Justice Stevens' concurrences in Massachusetts v. Upton, 104 S. Ct. 2085, 2089 (1984), and his dissents in Michigan v. Long, 103 S. Ct. 3469, 3489 (1983); Montana v. Jackson, 103 S. Ct. 1418, 1418 (1983); and South Dakota v. Neville, 103 S. Ct. 916, 924 (1983)(Marshall, J., joining Stevens' dissent). *Cf.* California *ex. rel.* Cooper v. Mitchell Bros. Santa Ana Theater, 454 U.S. 90, 94 (1981)(Brennan, J., dissenting)(suggesting Court remand to state court obscenity case to determine if basis was federal or state law). Given the views expressed by Justice Marshall in his dissent in Oregon v. Hass, 420 U.S. 714, 729 (1975), it is curious that he did not join in Justice Stevens' opinion in Massachusetts v. Upton, 104 S. Ct. 2085, 2089 (1984)(urging initial reliance on state law).

As things now stand, the only Supreme Court advocate of a principled and neutral process view of reliance on state law is Justice Stevens. *See Upton,* 104 S. Ct. at 2089 (Stevens, J., dissenting); *see also* Collins, *Justice Stevens Becomes Advocate of States' Role in the High Court,* Nat'l L.J., Aug. 27, 1984, at 20, col. 1. Oddly enough, the view propounded by Justices Brennan and Marshall seems most incompatible with the protection of individual rights, given the Burger Court's anxiousness to review state court cases upholding civil liberties claims. *See* Collins & Welsh, *The Court v. Rights,* N.Y. Times, Oct. 7, 1983, at 31, col. 5; Welsh, *Whose Federalism? The Burger Court's Treatment of State Civil Liberties Judgments,* 10 HASTINGS CONST. L.Q. 819, 823-33 (1983).

[16] For one view of the concept of "retained rights," see *infra* note 143.

[17] *See* B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 95-100 (1977)(discussing judicial review in pre-Constitutional period). The contributions of state judges in the area of judicial review have gone relatively unnoticed. For example, little has been written on the career of Pennsylvania Chief Justice John B. Gibson. *See* W. PORTER, AN ESSAY ON THE LIFE, CHARACTER & WRITINGS OF JOHN BANNISTER GIBSON (1890); T. ROBERTS, MEMOIRS OF JOHN BANNISTER GIBSON (1890). Chief Justice Gibson's opinions offer an-

eralist system, we are likely to see less, rather than more, direct reliance on federal case law. This is not an example of the "new" interposition. Rather, it is a model of government grounded in the priority, not supremacy, of state law. This model of state sovereignty can be as acceptable to the person from Michigan as to the person from Mississippi. It demonstrates both due respect for the present and a fitting regard for the past. In turn, such an understanding of the present makes it possible to exalt the best of the past in order to build upon the opportunities it provides for the future.

In what follows I will sketch the process whereby state constitutional law lost its preeminent status. Thereafter, the consequences of this phenomenon will be outlined. Finally, some general suggestions will be offered on how to rejuvenate the constitutional law of the states, with particular attention to the jurisdictional framework established by the United States Supreme Court in *Michigan v. Long*.[18] The starting premise of these remarks is that state law must be asserted, by bench and bar, as if state law actually were *law* in the sense that it imposes limits on government independent of those mandated by the federal Constitution. In this way the notion of "states rights" may be reconciled with the freedom correctly associated with constitutional government in America.

I. The Dormancy of State Constitutional Law

A. *Federal and State Court Relations and Their Impact on State Law*

Early in our history, Richard Henry Lee and others voiced opposition to the national Constitution hammered out in Philadelphia. They pressed for a bill of rights, similar to those found in the state constitutions, which bound government officials to "make no laws infringing upon them."[19] Others, like Melancton

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other view of judicial review. *See, e.g.*, Eakin v. Raub, 12 S. & R. 330, 334 (Pa. 1825); De Chastellux v. Fairchild, 15 Pa. St. 18, 20 (1850). For one modern account of state judges and judicial review, see Linde, *supra* note 6, at 179-93.

[18] 103 S. Ct. 3469 (1983).

[19] I The People Shall Judge 339 (1949); *see also* II The Complete Anti-Federal-

Smith, feared that the powers conferred by the Constitution upon the national government would override the liberties secured by the states.[20] On the one hand, the demand was for a federal constitution more respectful of fundamental rights. On the other hand, there was a fear that those rights protected by states would in time be "consumed" by the national government exercising its powers under the same constitution. As it turned out, the demand was honored and the fear realized—though not quite along the lines anticipated by the early anti-federalists.

Perhaps in the formative period characterized by *Barron v. Baltimore*,[21] the sovereign federal and state governments operated in such a manner that "the line of jurisdiction [was] accurately drawn."[22] But I am inclined to agree with the view that it was never really so because of the inherent contradiction in the very notion of dual sovereignty.[23] Even so, it is fair to say that this line has been more visible in some periods in our history than in others. Thus, in political terms, we have moved from "dual federalism,"[24] wherein the respective roles of state and

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IST 408-13 (H. Storing ed. 1981)(there are certain natural rights which governments ought not control).

[20] *See* VI THE COMPLETE ANTI-FEDERALIST, *supra* note 19, at 171 (warning that American liberties would be gradually encroached upon by national government).

[21] 32 U.S. (7 Pet.) 243, 250 (1833).

[22] *See* VI THE COMPLETE ANTI-FEDERALIST, *supra* note 19, at 169. Of course, some of the framers saw the need for federal law to check certain state abuses. For example, James Madison had proposed a constitutional amendment prohibiting the states from violating freedom of conscience and the press, and the right to trial by jury in criminal cases. THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1027 (B. Schwartz ed. 1971). Madison considered this proposed amendment the most valuable amendment of all. *Id.* at 1113.

[23] *See* Shapiro, *American Federalism* in CONSTITUTIONAL GOVERNMENT IN AMERICA 359, 360-61 (R. Collins ed. 1980).

[24] *See* Walker, *American Federalism—Then and Now*, 24 THE BOOK OF THE STATES 23, 23 (1982). According to Walker, "dual federalism" best characterized federal-state relations between the period from the establishment of the national government until 1930:

> While the states' regulatory, intra-state commerce and, in a few cases, taxing authorities were constrained by some of the federal government's regulations, none of these state powers was denied or in any real sense undermined. Most important, state and local governments enacted, performed and funded nearly all of the growing number of public services provided directly to the citizenry. In short, despite limited expansions of national authority during the 1865-1930 period, Madison's essentially compartmentalized system—dual federalism, if

federal government were distinct and compartmentalized and based on the primacy of state government, to a model of federalism, characterized as "cooperative,"[25] wherein the federal government undertook a more active role in the development and funding of social programs traditionally entrusted to state government. More recently, "cooptive federalism"[26] emerged and was characterized by increased governmental activism with the primary role assumed by the national government. Finally, a new federalism is evolving which has several of the primary features of the "old federalism."[27]

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you will—was still essentially intact by the end of the third decade of this century.

Id.; see also G. ETHRIDGE, MISSISSIPPI CONSTITUTIONS 42 (1928)(Constitutional framers intended states to be principal institution in dual plan of government).

[25] Walker, *supra* note 24, at 23. This era in federal-state relations is said to cover the period between 1932 and 1960: "Between the elections of Franklin D. Roosevelt and John F. Kennedy, dual federalism declined precipitously. The earlier separation of services (and of funds) went first, followed by the emergence of a full-blown theory of cooperative federalism during the late 1940's and early 1950's." *Id.* Further,

> dramatic growth in the grant-in-aid, regulatory, and subsidy roles of the national government would appear to signify an extraordinary shift toward centralization, the collapse of the states' authority and influence in the system . . . . Closer examination of the functional features of the system, however, reveals that most of the regulatory reforms were directed at interstate objects, that states' police powers in intrastate commerce had not been undermined [and] that a majority of the states' executive departments and agencies were unaffected . . . . [I]t was a balanced, bouyant, functioning system . . . .

Id. at 24.

[26] *Id.* at 24-25. This era in federal-state relations is said to cover the period from 1961 to 1980:

> Between the administrations of John Kennedy and Jimmy Carter, the residuals of dual federalism disappeared and cooptive federalism triumphed. This victory was costly, however, since the constraints that served to make cooperative federalism viable were demolished in the process, to be replaced, in effect, by a cooptive, overly crowded pattern of intergovernmental relations. Despite the apparent and real differences between Johnson's Creative Federalism, Nixon's New Federalism, Carter's Partnership Federalism and Congress' own eclectic but ascendant version, all four stressed governmental activism to lesser or greater degrees, a pivotal or primary role for the national government, and a federal-state-local sharing of various functional responsibilities. Hence, they all claim to be offspring of the cooperative federalism concept that had risen to prominence in the 1950s and early 1960s.

Id.

[27] The "new federalism" advanced by the Reagan administration is generally an attempt to eradicate "some of the more costly and intrusive manifestations of [federal] interventionism that emerged in the 1960s and 1970s." *Id.* at 29. Specifically, the "new

However helpful the above models may be, they underscore the extent to which scholars and "school boys" view our system of government in relational terms. We have been trained to study institutional relationships, to think in terms of the political relationship between governments and between their respective judiciaries. Thus, when Justice Hugo Black announced his incorporation theory of the Bill of Rights and the fourteenth amendment,[28] we were dazzled. Measured in relational terms, John Marshall's narrow view of the scope of the fifth amendment in *Barron v. Baltimore*[29] was classically simple. But when Thurgood Marshall assigned an expansive view to the fifth amendment in *Benton v. Maryland,*[30] things no longer seemed

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federalism" is an effort to shift power, programs and funding sources from the national to the state and local levels and to deregulate or eliminate instances of overregulation. *Id.* at 27. *See generally,* Herbers, *U.S. Plans To End Nationwide Code for Construction,* N.Y. Times, Aug. 18, 1985, at 1, col. 2.

[28] *See* Adamson v. California, 332 U.S. 46, 71-72 (1947)(Black, J., dissenting). Justice Black wrote:

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section . . . were intended to accomplish was to make the Bill of Rights, applicable to the States.

[29] 32 U.S. (7 Pet.) 243, 247 (1833). Considering whether the just compensation clause of the fifth amendment was to be applied to state governments, Justice Marshall wrote:

> The question . . . presented is . . . of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated . . . . [The limitations in the national Bill of Rights] are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons for different purposes.

Id.

[30] 395 U.S. 784, 796 (1969). The petitioner had been tried in a state court on charges of burglary and larceny. He was found not guilty of larceny but was convicted of burglary. A new trial resulted in his being found guilty of both offenses. *Id.* at 785-86. The United States Supreme Court applied to the states the fifth amendment's double jeopardy clause, concluding that petitioner's larceny conviction could not stand. *Id.* at 793-96. Speaking for six members of the Court, Justice Thurgood Marshall wrote:

> Our recent cases have thoroughly rejected the . . . notion that basic Constitutional rights can be denied by the states as long as the totality of the circum-

simple. As in the political sphere, such developments evoked still other relational models to describe judicial evolution. A "separation model"[31] has been used to describe the Marshall-Taney period, in which state and federal constitutions were viewed as being essentially separate in function and scope, with protection of basic rights entrusted to the states. A later period has been described as the "partnership model,"[32] in which responsibility for the protection of basic rights was shared, although the states retained their dominant position. A "national model"[33] characterizes much of this century, in which basic rights are considered to be the concern primarily of national law.

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stances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," the same constitutional standards apply against both the State and Federal Governments.

Id. at 795.

[31] Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 275 (1973). The "separation model" has been described in the following way:

> The view enunciated by Chief Justice Marshall established a model that governed the operation of the state and federal bills of rights from 1833, when *Barron v. Baltimore* was decided, until the enactment of the Reconstruction Amendments in the 1860s. Under this model the Federal Bill of Rights was truly parallel to the state bills of rights. Where the former established minimum guarantees against the power of the federal government, the latter set basic standards for the operation of state governments. The beauty of the model was its theoretical purity. Each of the two parallel charters had a neatly defined role. They could not overlap or interfere with one another.

Id. at 277.

[32] *Id.* at 279. The "partnership model" and its evolution have been described in the following manner:

> Even as the Supreme Court's narrow interpretation of the privileges and immunities clause [of the fourteenth amendment] was insuring the continued pre-eminence of state bills of rights, a theory was born that would transform the partnership between state and federal governments so that federal guarantees increasingly predominated. This theory posited that even though the first eight amendments to the federal Constitution were not applied to the states per se by the privileges and immunities clause, some of the rights secured by those amendments might nevertheless be applied to the states through the fourteenth amendment's due process clause.

Id. at 281.

[33] *Id.* at 283. The "national model" brought about a "[t]rend toward federal dominance . . ." due to the application of the key provisions of the Bill of Rights to the States. *Id.* "Ultimately, then, the partnership model has given way to a national model, where all basic rights are entrusted to the care of the federal government." *Id.* at 284.

We now appear to be entering into a new period that is reminiscent of an earlier one.[34]

The historical evolution of the federal system illustrated by these models altered the character of the American judiciary,

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[34] *See supra* note 32 and accompanying text. This new period is similar in the sense that the Burger Court has curbed the authority of federal courts to correct state actions challenged on federal or state law grounds. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 911 (1984)(federal courts may not employ state law to enjoin state action); Rose v. Lundy, 455 U.S. 509, 510 (1982)(habeas corpus petitions containing unexhausted state claims must be dismissed by district courts); Stone v. Powell, 428 U.S. 465, 494 (1976)(federal habeas corpus relief unavailable where state previously provided opportunity for full and fair hearing of fourth amendment claim).

This brand of deference to the states may indicate a willingness by the Burger Court to withdraw the mandate of federal law in other areas as well. For example, the Court might decide to restrict the application of the incorporation doctrine in certain classes of criminal procedure cases. Already, three members of the Court, Justices Powell and Rehnquist and Chief Justice Burger, have expressed reservations as to the full incorporation of federal rules and procedures surrounding the right of trial by jury in criminal cases under the sixth amendment. *See, e.g.*, Crist v. Bretz, 437 U.S. 28, 52, 53 (1978)(Powell, J., dissenting)(fourteenth amendment does not necessarily incorporate federal jury trial rule); Ballew v. Georgia, 435 U.S. 223, 246 (1978)(Powell, Burger and Rehnquist, concurring)(state jury trial procedure need not be identical with federal procedure); Apodaca v. Oregon, 406 U.S. 404, 405 (1972)(Powell, J., concurring)(fourteenth amendment does not incorporate all elements of federal jury trial procedure).

Suppose these Justices were to develop similar reservations concerning other Bill of Rights provisions. Justice O'Connor would be a likely candidate for a fourth vote. When Justices Blackmun, Brennan or Marshall retire, the new appointee could provide the crucial fifth vote. In this scenario, the Court conceivably could decline to apply certain Bill of Rights provisions to the states *to the same extent* it applies them to the federal government. A likely area in which a Court with such an attitude might choose to act is in a case raising the issue of whether or to what extent the eighth amendment's bail provision ought to apply to the states. How persuasive would such a Court find Justice Harlan's powerful dissent in Duncan v. Louisiana, 391 U.S. 145, 171-93 (1968)? Although possible, it is unlikely that Justice White would subscribe to this view. *See id.* at 148-49 (fourteenth amendment guarantees fundamental right to trial by jury in state courts). For another view of the incorporation question, see Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 178-82 (1981)(discussion of attempts at recognizing freedom of speech as a privilege and immunity of national citizenship). Additional issues concerning the incorporation doctrine and its effect on state courts are discussed in Collins, *Foreword: Reliance on State Constitutions: Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV., vi, xv (1985). *See also* Taylor, *Meese & His Candor*, N.Y. Times, Aug. 3, 1985, at 7, col. 3 (according to a Justice Department spokesman, " 'There may well be a case in which we might argue that a particular provision of the Bill of Rights does not apply.' ").

In other important ways, the "new period" is notably different. For instance, many state courts are relying upon state law in assuming greater responsibility for vindicating individual rights. For examples of this development, see *supra* notes 7-11 and accompanying text.

and left various segments of it not altogether certain of their role as constitutional decision-makers. After all, federal judges came to decide state law questions[35] and state judges were regularly deciding federal law questions, even if they were without the constitutional authority to create federal law.[36] So involved did state judges become in the process of deciding federal questions that there seemed little time (or reason) left to think about a state's own law, including the state constitution.[37] As long as this continued, the law of the fifty state constitutions remained generally dormant. Ironically, enthusiasm for applying the Bill of Rights to the states contributed to the "disparagement" of other rights retained by the people, namely, state constitutional rights.[38]

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[35] *See, e.g.*, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293-95 (1982)(recognizing authority of federal district courts to apply state law). *But cf.* Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 911 (1984)(federal courts may not employ state law to enjoin state action). For an interesting discussion regarding federal court application and interpretation of state law, see G. ANASTAPLO, *supra* note 1, at 646. *See also* Anastaplo, *Mr. Crosskey, the American Constitution, and the Nature of Things*, 15 LOY. U. CHI. L.J. 181, 203, 244 n.142 (1984)(suggesting that Supreme Court interpretations of state statutes and constitutions be conclusive).

[36] *See* Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118, 1133-43 (1984).

[37] *Cf.* Commonwealth v. Upton, 390 Mass. 562, 458 N.E.2d 717 (1983), *rev'd* 104 S. Ct. 2085 (1984). In its decision, the Supreme Judicial Court of Massachusetts stated that it would define the state constitutional guarantee against unreasonable search and seizure only if the federal standard were unacceptably vague. *Id.* at 724. The Supreme Court reversed the Massachusetts court's fourth amendment interpretation, 104 S. Ct. 2085 (1984), and on remand, the Supreme Judicial Court of Massachusetts did look to the state constitutional provision and found that it provided protection for the defendant that the United States Supreme Court had determined the fourth amendment did not afford. *See* Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985). Since *Upton*, the Massachusetts court has begun to think about and interpret the state constitutional provision. *See* Commonwealth v. Ford, 476 N.E.2d 560 (1985)(warrantless search of locked trunk invalid under state constitution); Commonwealth v. Sheppard, 394 Mass. 381, 476 N.E.2d 541, 546 (1985)(construing Massachusetts Declaration of Rights on remand from Supreme Court).

[38] *See* Massachusetts v. Upton, 104 S. Ct. 2085, 2089-91 (1984)(Stevens, J., concurring)(by resting its judgment on federal constitutional grounds while refusing to interpret the state constitution, state court "disparaged" rights of state's citizens contrary to principle embodied in ninth amendment).

B. The Effects of Dormancy

Our culture prides itself for its high regard for individual liberty. That regard is manifested by Americans' general acceptance of the United States Supreme Court's interpretations of the national Bill of Rights and the fourteenth amendment. Indeed, this acceptance is a sign that we as a government and a people take rights "seriously." Conversely, "[i]f the Government does not take rights seriously, then it does not take law seriously either."[39] This assertion is offered in the context of rights protected under federal law. But how seriously have we taken the law of the states and the rights which it independently protects?

We have allowed American constitutional law to become lopsided. If rights are not protected in Washington, D.C., then some do not expect them to be honored in Helena, Montana, either.[40] The protection of rights is considered to be limited not only to a single constitutional instrument, but also to the construction of that document by a single court. This view of taking rights "seriously" has produced, in practical terms, a world wherein the rule of state law is no longer itself taken seriously.[41] Freedom of speech questions have become first amendment questions simply. Self-incrimination and right to counsel questions have become *Miranda* questions solely. The assumption is that if a governmental act does not offend the federal Constitution then it is, without further inquiry, presumed to be valid. Never mind whether it needs to be authorized by a state law.[42]

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[39] *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 205 (1977).

[40] *See, e.g.*, State v. Jackson, 672 P.2d 255, 260 (Mont. 1983)(declaring that state protection against self-incrimination is never greater than protection under fifth amendment as interpreted by the United States Supreme Court); *see also* Collins, *Reliance on State Constitutions: The Montana Disaster*, 63 TEX. L. REV. ____ (1985).

[41] An example of this can be seen in the case of City of Cleburne v. Cleburne Living Center, 53 U.S.L.W. 5022 (1985). There, in a case involving a municipal zoning law that discriminated against the mentally handicapped, an equality claim was litigated under the federal Constitution and ultimately resolved by the United States Supreme Court. Significantly, this admittedly difficult case could more easily have been resolved under the Texas Mentally Retarded Persons Act of 1977. *See* TEX. REV. STAT. ANN. art. 5547-300, § 7 (Vernon Supp. 1985).

[42] *Cf.* State v. Lowry, 295 Or. 337, 667 P.2d 996, 999 (1983)(proper sequence of decision begins with rules of law and scope and limits of legal authorization before reaching constitutional issues because when challenged act is not authorized, resort to constitutional issue is premature). As Justice Linde of the Oregon Supreme Court has observed:

Never mind whether it is barred by any law passed by a state legislature.[43] And never mind anything to the contrary contained in the once-supreme law of the state.

The effects of this lopsided view of American law are disturbing. Until a constitutional question is resolved by the United States Supreme Court, it remains a question. This is surprising because state judges have it within their power to render a wide cross section of *final* judgments based on state law, provided those rulings do not interfere with some federally protected interest. (Despite the qualifier, that power *could* result in a fairly sizeable body of law.) Even so, the actual formulation of a final and logically sustaining body of legal standards is no longer seen as a function of state courts in cases involving constitutional issues.

Where the state judiciary has neglected state law, others are apt to do likewise. That may help explain why the last major constitutional law treatise that discussed the law contained in

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> It might seem surprising to members of the public that the authority of law enforcement officers to search or seize their property or other effects without a warrant in most respects is not expressed in or defined by any law, at least in Oregon. If so, the surprise reflects in part a misconception of constitutional law. Of course, the state and federal constitutions impose outer limits on the permissible range of authority to conduct searches and seizures . . . . But the constitutions neither grant such authority to anyone, nor prescribe who may exercise it, nor define the circumstances and manner in which, within those outer constitutional limits, the authority should or should not be employed.

State v. Greene, 285 Or. 337, 591 P.2d 1362, 1366 (1979)(Linde, J., concurring). Rather, continued Justice Linde:

> These are questions which, as far as the powers of state and local officers are concerned, are left to state law. Like all public law and its administration, they are the responsibility of politically accountable legislators and other state and local officials. When a court is called upon to decide only whether a particular search or seizure crossed the constitutional boundary, its decision marks only that boundary; it does not prescribe the law with respect to the officer's authority to conduct the search or seizure apart from the outer limit. Within this limit, the question of his authority is not a constitutional question but one of ordinary law.

Id.; see also State v. Tourtillott, 289 Or. 835, 618 P.2d 423, 435-37, 444-48 (1980)(Linde, J., dissenting)(challenging validity of game check point stop).

[43] *Cf.* State *ex rel.* Arnold v. County Court, 51 Wis. 2d 434, 187 N.W.2d 354, 357 (1971)(although not barred by fourth amendment, evidence gained through electronic eavesdropping inadmissable under state statute).

the states' bills of rights was published in 1927.[44] In terms of what is taught in our colleges and law schools, Professor Swindler was entirely correct when he said that state constitutional law has been and continues to be a "chronically neglected subject."[45] Fewer than a dozen of the nation's law schools have courses on state bills of rights. Our law schools are producing generation after generation of lawyers and law clerks who have reduced to memory literally scores of federal court holdings and yet seldom know the first thing about the text, history or function of a state constitution.[46]

So obsessed have the bench, bar and academy become with federal law that it should not be surprising to find annotated *state* law volumes whose covers identify only the United States Constitution—to the exclusion of its state counterpart.[47] It is even more surprising to find what is, and is not, contained inside these annotated "state law" volumes. The annotations for various state bills of rights provisions often list many cases which fail to mention the state constitution. What they do mention are state court interpretations of one or more provisions of the federal Bill of Rights or the fourteenth amendment.[48] Textual dif-

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[44] *See* T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (8th ed. 1927).

[45] Swindler, *State Constitutional Law: Some Representative Decisions*, 9 WM. & MARY L. REV. 166, 166 (1967).

[46] Justice Charles G. Douglas (recently retired) of the New Hampshire Supreme Court has observed:

> The fact that law clerks working for state judges have only been taught or are familiar with *federal* cases brings a federal bias to the various states as they fan out after graduation from "federally" oriented law schools. The lack of treatises [or] textbooks developing the rich diversity of state constitutional law developments could be viewed as an attempt to "nationalize" the law and denigrate the state bench.

Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1147 (1978)(footnote omitted and emphasis in original). *See also* Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 228 n. 275 (1983)(citing various sources of criticism for neglect of state constitutions).

[47] *See, e.g.*, CONN. GEN. STAT. ANN. (West 1967 & Supp. 1983)(volume containing Connecticut Constitution as well as United States Constitution lists federal but not state constitution on binding).

[48] For example, of 43 decisional annotations listed under one state freedom of expression clause, only seven made any mention of the state guarantee under which they were listed. The remaining 36 involved state appellate court interpretations of the first amendment. *See* Annotations to ARIZ. CONST. art. II § 6, in ARIZ. REV. STAT. ANN. (WEST SUPP. 1983).

ferences between state and federal guarantees, like those often seen in free speech provisions[49] are too easily obscured where the two are treated as if they were one. The same holds true, as well, for state constitutional bail[50] and self-incrimination[51] guarantees, among others.[52]

Despite all of this and much more, indications are that state constitutions will assume an increasingly more visible role in American law in the years ahead. This Rip Van Winkle-like return of state bills of rights to the world of American law will, of course, raise still other questions. I will now address some of

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[49] For comparison of textual differences between the first amendment and some state freedom of expression provisions, see *infra* note 135.

[50] *Compare* U.S. CONST. amend. VIII ("Excessive bail shall not be required . . . .") *with* MISS. CONST. art. III, § 29 ("Excessive bail shall not be required, *and all persons shall, before conviction, be bailable by sufficient sureties,* except for capital offenses when the proof is evident or presumption great.")(emphasis added). Note that the exception declared in the Mississippi Constitution pertains *only* to capital cases. Under the state constitution, the case for preventive detention would seem to be quite difficult, if not impossible, to make. In the case of juveniles, however, the Mississippi Legislature appears to have provided for preventive detention. *See* MISS. CODE ANN. § 43-23-11 (1972). Challenged under the federal Constitution, preventive detention of juveniles has been upheld by the United States Supreme Court. *See* Schall v. Martin, 104 S. Ct. 2403, 2419 (1984).

[51] *Compare* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself") *with* MISS. CONST. art. III, § 26 ("In all criminal prosecutions the accused . . . shall not be compelled to *give evidence* against himself")(emphasis added). The Mississippi Supreme Court has held that despite this textual difference, the state constitutional provision need not necessarily be interpreted as broader than the fifth amendment privilege. *See* McCrory v. State, 342 So. 2d 897, 901 (Miss. 1977). Other states have taken a different view. *See* State v. Neville, 346 N.W.2d 425, 428-29 (S.D. 1984)(discussing distinction between state and federal constitutional provision relating to privilege and construing state language to provide broader protection); *see also* Welsh & Collins, *supra* note 14, at 13-14.

[52] *Compare* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.") *with* MISS. CONST. art. III, § 12 ("The right of every citizen to keep and bear arms *in defense of his home, person, or property* . . . shall not be called into question, but the legislature may regulate or forbid carrying concealed weapons")(emphasis added).

Compare U.S. CONST. amend. V ("private property [shall not] be taken for public use, without just compensation") *with* MISS. CONST. art. III, § 17 ("Private property shall not be taken *or damaged* for public use . . . .")(emphasis added).

There are, of course, other notable textual differences. *See, e.g.,* MISS. CONST. art. III, § 13 (freedom of expression); *id.,* § 18 (freedom of religion); *id.,* art. VIII, § 208 (separation of church and state in education). These and other differences are highlighted in Collins, *Bills & Declarations of Rights Digest,* in THE AMERICAN BENCH 2483 (1985).

those questions.

II. Rejuvenating the Law of the States: A Few Suggestions

What follows are some suggestions that derive more from a functional concern with state constitutional law than from the relational models already touched upon. Here, I am more concerned with state law as "political technology for managing conflict . . . through well defined processes of . . . adjudication."[53] Whatever the relation between state and federal courts, it is important to emphasize one of the major operational goals of a state constitution: to place checks on the government's plenary powers. In order for the system of state government to operate *under the authority of its own law,* those checks must originate within that system independent of the laws of another sovereign.[54] Integrally related to this operational goal is a corresponding concern for further improving the quality of litigating and resolving state law questions. Here, by contrast, federal-state court relations can greatly affect the way state cases are to be litigated. Both a principled conception of state law and a practical plan to execute its command are prompting the legal profession to reevaluate past litigation habits.

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[53] Lutz, *The Purposes of American State Constitutions,* 12 Publius 27 (1982).

[54] Justice Robert Utter, writing for the Washington Supreme Court, has noted:

> [S]tate courts have a duty to independently interpret and apply their state constitutions . . . . By turning to our own constitution *first* we grant the proper respect to our own legal foundations and fulfill our sovereign duties. [Also,] by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied.

State v. Coe, 101 Wash. 2d 364, 679 P.2d 353, 359 (1984)(emphasis added). *See also* Collins, *Reliance on State Constitutions, supra* note 15, at 5-8, 13-14 (reactive approach to state constitutional interpretation does not give proper respect to state institutions). For an informative analysis arguing that one state's high court has abdicated its responsibility to develop state constitutional law, see Porter & Tarr, *The New Federalism and the Ohio Supreme Court: Anatomy of a Failure,* 45 Ohio St. L.J. 143, 145-58 (1984).

Of course, part of a state's pact with the union is that it will abide by the federal Constitution and the laws passed pursuant to it: "the current revival of state constitutional law can be no excuse to weaken those constitutional standards that protect us in every state." Linde, *supra* note 6, at 200 (footnote omitted).

A. A Uniform Approach to State Law Questions

> Just as it is a fundamental rule of appellate procedure to avoid expressing opinions on constitutional questions when some other resolution of the issues renders a constitutional ruling unnecessary, . . . a similar policy of judicial restraint moves us to forbear from ruling on federal constitutional issues before consulting our state constitution.
>
> —Justice David Nichols[55]
> Maine Supreme Judicial Court

The single most important contribution that can be made to revitalize state law is to institute a practice whereby the invocation of state law is the rule rather than the exception in all cases, particularly those affecting individual rights. Justification for such an approach can be found in both the theory and practice of the law. Courts should disfavor, and lawyers should discourage, the tendency by some either to employ state law on a selective basis or to ignore state law altogether in pursuit of federal constitutional claims.

When state statutory or constitutional law is disregarded by the litigants, there is, in practical terms, no opportunity for the reviewing court to construe state law in a manner that does not offend federal constitutional standards.[56] This may leave the impression either that state law is incompatible with the command of the fourteenth amendment, or that the scope of state law must be resolved in a future case notwithstanding conclusions arrived at in the present case on the basis of the federal Constitution.[57] Such an approach, however, stands the logic of the

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[55] State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984)(citations omitted).

[56] In State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983), Justice Linde, writing for the court, stated that a "court should not readily let parties, simply by their choice of issues, force the court into a position to decide that the state's government has fallen below a nationwide constitutional standard, when in fact the state's law, when properly invoked, meets or exceeds that standard." 666 P.2d at 1320.

[57] It is well to remember that a claim that a person's constitutional rights have been violated runs against the government—in this context, the state and its subdivisions. Such a claim necessarily presents the question whether state law authorized, or at least made possible, the challenged action. When the claimant in state court leaps over this

fourteenth amendment on its head.[58] The fourteenth amendment guarantees *minimal* protections while leaving the various

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question and bases a challenge solely on the Constitution, not only is the state question left unanswered, but also the implication is that even the claimant believed state law authorized his alleged injury. *See supra* note 42.

[58] In this regard, Justice Linde has advanced the following argument:

> The federal source of all "due process" and "equal protection" attacks on state regulation is the fourteenth amendment's command that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Whether this command has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in a case. When the state court holds that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment.

Linde, *Without "Due Process": Unconstitutional Law In Oregon*, 49 OR. L. REV. 125, 133 (1970); *see also* Linde, *supra* note 6, at 178-79 (federal issue improperly reached when state law protects claimed right).

This view has been adopted by several state high courts including the Oregon Supreme Court. *See, e.g.*, Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 653 P.2d 970, 975 (1982)(no violation of equal protection clause of fourteenth amendment if court finds state statute violative of state constitution); Sterling v. Cupp, 290 Or. 611, 625 P.2d 123, 126 (1981)(state does not deny right to privacy in violation of federal Constitution if state rule found violative of state constitution). For additional views by Oregon justices, see *infra* note 69. Consider also the observation made by the Maine Supreme Judicial Court in State v. Cadman, 476 A.2d 1148 (Me. 1984): "There is no deprivation of an accused's fourteenth amendment rights when we determine he has a remedy under our state constitution. It is only when we conclude that his claim under the state constitution fails, therefore, that we must examine his conviction from a standpoint of federal constitutional law." *Id.* at 1150 (citing Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980)). For other cases and commentators discussing this approach, see *infra* notes 69-72.

Those troubled by the primacy approach would do well to consider its basic principle in the following example. Suppose a building inspector cited the owner of a business for allegedly violating a local health ordinance. And assume further that such official conduct might run afoul of some interest otherwise protected by the fourteenth amendment. Now, if a court were to construe the ordinance so as to exonerate the business owner, would that court thereafter be compelled to review and resolve any possible federal challenges? What if the same court held that state statutory law preempted the matter? In this example, and thousands of situations like it, courts regularly render state law judgments in a way so as to avoid deciding potential federal questions. Why, then, should state constitutional law be understood differently? That is, if it grants the relief sought, there is no actionable violation of the fourteenth amendment. *Cf.* Carreras v. City of Anaheim, 768 F.2d 1039, 1050 (9th Cir. 1985)(constitutional claim resolved under state constitution).

states free to give individuals greater protection under their own laws. A few illustrations may help clarify this point.

Assume that a litigant seeks to challenge action taken by a secondary public school on the grounds that the act breaches the principle of separation of church and state. There are a number of ways a reviewing court might dispose of the case before considering the requirements of the first amendment as applied to the states by the fourteenth amendment. For example, the challenged action may be prohibited by administrative rules or regulations governing school activities, or may be inconsistent with the command of a state statute.[59] The contested action may also be incompatible with some provision of the state declaration of rights[60] or with some other provision contained in the education article of the state constitution.[61] If so, is there a need to proceed to the federal question? Thus understood, it becomes obvious that one must proceed a great distance down the path before arriving at the point where the challenged state act intersects with the first and fourteenth amendments. Simply put, lawyers should be dissuaded from speeding to the federal constitutional exit first. Of course, this merely illustrates the accepted principle that cases should be decided on the narrowest possible ground. In individual rights cases, however, the principle is all too often ignored.

Aside from the obvious fact that state law does not cease to be law simply because it coexists with the federal Constitution, there are some practical reasons why courts should encourage the complaining party to address state law prior to federal law. In the illustration presented above, a court's ruling that the challenged practice did not violate the federal Constitution would not necessarily mean that state law therefore allowed it.

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[59] *See, e.g.*, CAL. EDUC. CODE § 51511 (West 1978)(prohibiting instruction of religious principles in public schools); IND. CODE ANN. § 20-10.1-7-10 (Burns Supp. 1984)(school employees prohibited from causing or encouraging attendance at religious observances).

[60] *See, e.g.*, FLA. CONST. art. I, § 3 (prohibiting use of public revenue in aid of any sect or sectarian institution); IND. CONST. art. I, § 6 (no public money to be used for benefit of religious or theological institutions).

[61] *See, e.g.*, CAL. CONST. art. IX, § 8 (prohibiting instruction in sectarian or denominational doctrine in public schools); MISS. CONST. art. VIII, § 208 (no public funds to be appropriated toward support of sect or sectarian school); WYO. CONST. art. VII, § 8 (prohibiting use of public school funds to support sectarian schools).

As the Nebraska bench and bar know, the United States Supreme Court's 1968 decision permitting public textbook loans to parochial school students[62] did not foreclose a ruling to the contrary based on state law six years later.[63] Similarly, the first amendment holding in *Everson v. Board of Education*[64] did not assure the validity of publicly financed schoolbus transportation for children attending religious schools in Idaho.[65] In other words, today's resolution of a federal claim does not necessarily resolve the question raised by tomorrow's factually identical case brought under state law.

It is axiomatic that "certainty" should be a paramount goal of any legal system. In the school example given above, an initial resolution of state law claims adds to the certainty of state law[66] and obviates the need for reaching the federal constitutional question if state law provides the relief claimed.[67] Admittedly, certainty of state law can be achieved also by resolving the state law questions after the federal ones. But where a claim is sustained under federal law, the goal of certainty will oblige a state court thereafter to assume the added burden of passing on the state questions. Consequently, a state court will always have to present two opinions, one on federal law and another on state law, if it elects *not* to resolve state questions first. At least one state court has noted its willingness to accept this extra measure

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[62] Board of Educ. v. Allen, 392 U.S. 236 (1968).

[63] *See* Gaffney v. State Dep't of Educ., 192 Neb. 358, 220 N.W.2d 550, 557 (1974)(textbook loans to private schools prohibited by state constitution). For a judge's view that a state court decision resting on federal principles leaves state questions unanswered, see State v. Brown, 291 Or. 642, 634 P.2d 212, 220 (1981)(Linde, J., concurring).

[64] 330 U.S. 1 (1947). A New Jersey statute allowed local school districts to reimburse parents for money expended by them for transporting their children to parochial schools on public buses. Appellant-taxpayer alleged a violation of the state and federal constitutions. *Id.* at 3-4. The Supreme Court refused to hold that the statute violated the first amendment to the federal Constitution. *Id.* at 17-18.

[65] *See* Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860, 868 (1971)(statute making public school buses available to parochial school students violated provision of state constitution prohibiting sectarian appropriations), *cert. denied*, 406 U.S. 957 (1972).

[66] *See supra* note 54.

[67] Basing an individual rights decision on state law without reaching the federal question promotes a corresponding goal of legal systems, "finality of judgment" by foreclosing Supreme Court review of the case so long as state law affords the relief sought by the rights claimant. *See infra* notes 76-78 and accompanying text.

of work.[68]

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[68] The Vermont Supreme Court has declared that it will consider the law provided by the state constitution *after* it has rendered a ruling on the federal claims, notwithstanding the result of resolution of the federal claims. *See* State v. Badger, 141 Vt. 430, 450 A.2d 336, 347 (1982). In *Badger,* the court sustained the claimant's rights under the Vermont Constitution only after it had first declared that there was a corresponding, but independent, right available under federal law. One wonders whether the Vermont Supreme Court would feel equally obliged to resolve federal Bill of Rights issues even where a state statute clearly provided the relief sought. If not, why should the matter be any different when the state constitution is concerned?

The Washington Supreme Court, by comparison, has said that it will first analyze state law and then proceed to consider federal claims *even where the relief sought has been previously granted under state law.* Thus, in State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984), after the Washington Supreme Court sustained a claim under state law it added:

> Although our decision in this case rests on "bona fide separate, adequate, and independent [state constitutional] grounds," *and it is therefore unnecessary for us to reach the federal constitutional issues raised by the parties,* we will discuss the *potential* federal constitutional problems as well for two reasons. First, our reasoning may be of aid to other courts with similar problems who do not have state constitutional provisions similar to ours and must rely on appropriate federal constitutional provisions and decisions. Second, although the federal cases in no way influenced our decision under the Washington Constitution, such a discussion demonstrates that federal constitutional law also forbids a court to impose prior restraints on the publication of information lawfully obtained at public court proceedings.

679 P.2d at 361-62 (brackets in original and emphasis added). It is difficult to imagine how the Washington Supreme Court's opinion on the federal law claim can, under the circumstances, be anything but an advisory one. That is, by what authority can the state court proceed to "decide" the "potential" federal questions originally brought before it? If the United States Supreme Court is indeed without jurisdiction to review the Washington case, what does that in turn say about the nature of the opinion rendered on federal law by the state judges? If the pertinent provision of the state constitution relied upon by the Washington Supreme Court in *State v. Coe* were to be abolished or amended, what staying power, if any, would the court's "federal ruling" then have?

The Vermont and Washington cases also raise other troubling questions, particularly in light of Michigan v. Long, 103 S.Ct. 3469 (1983). *Long* held that unless a state court opinion contained a "plain statement" that the decision rested on "adequate and independent" state grounds, the Supreme Court would have jurisdiction to review the case. *Id.* at 3476. The Court noted that it had become more interested in "the application and development of federal law by state courts," *id.* at 3477 n.8, apparently because of the "important need for uniformity in federal law . . . ." *Id.* at 3475. But is not this objective frustrated, if not made altogether impossible, by opinions like those announced in *Badger* and *Coe*? If other states were to follow the Vermont and Washington examples, there could be literally scores of diverse "federal rulings" rendered by state courts, all presumably unreviewable because the decisions rested on state grounds. *See* Collins, *Justice Stevens, supra* note 15, at 22 n.27.

The better course is the one employed in Oregon,[69] New Hampshire,[70] Maine[71] and Washington[72] where courts examine state questions, including constitutional ones, antecedent to any federal claims. Consider the operation and advantage of this approach in the following hypothetical.

Imagine that a public school teacher is sued for defamation by a former student who had requested a letter of recommendation. The student maintains that the letter is libelous and seeks general and punitive damages. Now, is this a *Gertz*[73] first amendment case? Well, it may be. But it may just as easily be viewed as a state law case. State statutory law may recognize certain privileges and set requirements that might resolve the issue without the need for resort to federal law. Moreover, the state constitutional free speech guarantee itself might be construed to prohibit an award of punitive damages in a defamation case.[74] Under the practice followed in Oregon and elsewhere,

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[69] *See, e.g.*, State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1318 (1983)(relying upon state double jeopardy clause rather than parallel federal provision); *see also* Carson, *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L.J. 641, 653 (1983)(citing Oregon cases holding that state constitutional issues must be decided first); *supra* note 58.

[70] *See, e.g.*, State v. Kellenbeck, 474 A.2d 1388, 1392 (N.H. 1983)(declining to address federal search and seizure protection since parallel state provision provided sufficient protection); State v. Sidebotham, 474 A.2d 1377, 1381 (N.H. 1984)(same); State v. Ball, 471 A.2d 347, 350-51 (N.H. 1983)(same); *see also* Douglas, *State v. Ball: The Need to Put Last Things Last*, 4 TRIAL BAR NEWS 13 (1984).

[71] *See, e.g.*, State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984)(no deprivation of fourteenth amendment rights when accused has a remedy under state constitution); State v. Larrivee, 479 A.2d 347, 349 (Me. 1984)(legality of confession should initially be reviewed under state constitution).

[72] *See, e.g.*, State v. Coe, 101 Wash. 2d 364, 679 P.2d 353, 359 (1984)(deciding case on federal constitutional grounds first would be "improper and premature"); *see also* Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 505, 524 (1984)(state judges have duty to examine state constitution prior to federal Constitution wherever state action is alleged to violate rights). *But cf. supra* note 68.

[73] Gertz v. Robert Welsh, Inc., 418 U.S. 323 (1974).

[74] *See, e.g.*, Wheeler v. Green, 286 Or. 99, 593 P.2d 777, 789 (1979)(citing OR. CONST. art. I, §§ 8, 10).

It will be seen that the approach I am suggesting involves nothing more novel than consistent application of the time-honored principle that cases should be decided on the narrowest possible ground. In the libel example given in the text, the first amendment is involved only as a defense, a privilege of the speaker, in this case, the teacher. But if a common law privilege recognized in state law is an adequate defense for the speaker,

counsel would be encouraged to brief the state law issues in order to permit the reviewing court to dispose of the matter under state law.[75] This approach helps bring certainty to state law while assuring finality of judgment if the claims are settled under that law. That is, when a claim is sustained on an adequate and independent basis of state law, it is not subject to federal review on the merits unless the judgment contravenes federal law.[76] Finality assures the complaining party whose rights have been upheld in state court that this ruling will not be in jeopardy because of the possibility of federal review.[77] It also prevents the waste of judicial resources that results when a state court bases its decision on federal law and then has to rehear the matter under state law when the federal law decision is reversed and remanded by the United States Supreme Court.[78]

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there is no need for the state court to determine whether he is also protected by the first amendment. This approach helps to define the contours of local law and assures finality of the state court judgment while avoiding the confusion and waste that would result if the state court had rendered a first amendment decision that later proved to be wrong. The constitutional logic of this principle is set out in note 58, *supra*.

[75] Where state issues have not been addressed, the reviewing court may invite counsel to submit supplemental briefs. *See* State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1321 (1983)(court requesting additional memoranda or further argument if state law has been cited but not briefed or argued); State v. Jewett, No. 83-478, slip op. at 1 (Vt. Aug. 9, 1985)(court directed parties to file supplemental briefs on state law issue); *see also* Satter & Geballe, *Litigation Under the Connecticut Constitution—Developing a Sound Jurisprudence*, 15 CONN. L. REV. 57, 81-82 (1982)(noting state supreme court's willingness, in certain circumstances, to consider state claims not raised at trial).

[76] *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945)(no federal review of state court decision resting on adequate and independent state ground); Chicago, B. & Q.R.R. v. Illinois *ex rel.* Grimwood, 200 U.S. 561, 580-81 (1906)(no federal review of state court decision based on state law unless correct decision of properly raised federal claim would require a different outcome). Of course, the state law ground must be "adequate," *see, e.g.*, Sullivan v. Little Hunting Park, 396 U.S. 229, 232-34 (1969) and "independent" of federal law, *see, e.g.*, Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 489-92 (1965).

[77] *See* State v. Badger, 450 A.2d 336, 346 (Vt. 1982).

[78] *See, e.g.*, State v. Jackson, 672 P.2d 255, 260 (Mont. 1983)(on remand, state supreme court reached different result on basis of state law from previous decision that relied primarily on federal law); People v. Belton, 55 N.Y.2d 49, 51, 432 N.E.2d 745, 745-46, 447 N.Y.S.2d 873, 873-74 (1982)(same); State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1318 (1983)(affirming conviction on state law grounds after previous reversal on basis of federal law was vacated by United States Supreme Court); State v. Neville, 346 N.W.2d 425, 426-27, 430 (S.D. 1984)(reaching same result on state law grounds as previous decision that had been based on federal law and reversed by Supreme Court); State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976)(on remand, holding inventory search unreason-

All of this should be elementary. Still, in too many instances, particularly cases where criminal justice issues are involved, the common practice is to start (and often end) with a discussion of federal cases. More often than not, the failure to rely on the state constitution is not attributable solely to the judiciary. If the state constitution is ever invoked by the parties, it is usually done as an afterthought, a mere appendage to federal claims. As noted earlier, this may protract litigation, and if the state claim is overlooked, questions of legal malpractice or inadequacy of counsel may arise. Moreover, where the state claim is either omitted or allotted only cursory attention, the case will be all that more difficult for state judges to resolve. Finally, the lawyer who invokes state constitutional law selectively leaves the client vulnerable to changes in the federal decisional law in a case in which there is thought to be no need to rely on state law.[79]

Only foolish counsel would disregard pertinent state law in a personal injury or administrative law case. The same sort of regard needs to exist in individual rights cases as well, whether they arise under local rules or state statutes or constitutions. In light of how lawyers have been trained, and given the abundance

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able under state constitution; same result as originally reached under federal law); State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419, 421 (1983)(warrantless entry into dormitory room held violative of state constitutional provision though upheld by U.S. Supreme Court under fourth amendment).

[79] Most commonly the lawyer who engages in the selective use of state law will do so when federal decisional law is hostile to the claim the lawyer is advancing. For example, suppose counsel seeks to challenge the state's introduction of illegally obtained ("*Miranda*" violation) evidence to be used for impeachment purposes. As a matter of federal constitutional law, such a challenge would fail under the authority of Harris v. New York, 401 U.S. 222 (1971). In this context counsel may well encourage the state court to "break" from federal law by invoking the independent guarantees of state law in order to secure the desired result. So far as the practicing bar is concerned, this is an understandable use of state law. Note, however, that a lawyer who uses state law in such a manner ignores the real possibility that, in a more "favorable" setting, federal decisional law might change before the client's case is decided in state court. For example, suppose a state criminal appeal involved a warrant that clearly failed to meet the standards of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). If the lawyer based an appeal on this "clear" federal constitutional violation without arguing state constitutional principles, where would the client have been left if the Supreme Court had decided Illinois v. Gates, 103 S. Ct. 2317 (1983), while the case was still pending before the state appellate court? *See infra* note 104.

of federal decisional law, it is understandable—though not necessarily justifiable—that litigants might convert (perhaps unknowingly) every individual rights case into a federal controversy. This temptation must be resisted if state law is to retain the force of law.

B. A Few Words From Above: Michigan v. Long[80] *and Interstitial Thinking*

> [*Long*] makes it clear that it is a lawyer's duty to articulate with precision that state law is being relied upon and to insist that state courts rest their decisions explicitly on state grounds.
>
> —Burt Neuborne[81]

In a ruling issued on the final day of its 1982 Term, the United States Supreme Court declared:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law *required* it to do so.[82]

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[80] 103 S. Ct. 3469 (1983).

[81] Collins, *High Court Asserts Its Authority,* Nat'l L.J., Aug. 1, 1983, at 5, col. 3. Professor Neuborne served at the time as the Legal Director of the American Civil Liberties Union.

[82] 103 S. Ct. at 3476 (emphasis added). Compare what the Oregon Supreme Court said on the same matter in a decision handed down the *same* day as *Michigan v. Long*: "Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines." State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1321 (1984). Consistent with that view, the court had previously declared: "When this court gives Oregon law an interpretation corresponding to a federal opinion, *our decision remains the Oregon law even when federal doctrine later changes.*" State v. Caraher, 293 Or. 741, 653 P.2d 942, 946 (1982)(emphasis added); *see also* State v. Ball, 124 N.H. 226, 471 A.2d 347, 352 (1983)(court relies on federal decisions for guidance only); *infra* note 93 and text accompanying note 86.

This "assumption" of jurisdiction[83] is altogether characteristic of the Burger Court's perceived need to police the outer boundaries of the federal Constitution, especially in criminal justice cases. Professor Laurence Tribe has correctly observed that with the advent of *Michigan v. Long* the Supreme Court has "increased the penetration of federal review into state judicial systems."[84] This tendency is most readily apparent in the Court's certiorari review of state civil liberties decisions.[85] Still, this presumption

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[83] Justice O'Connor wrote for a five-member majority: "[I]n determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, ...we merely *assume* that there are no such grounds when it is not clear from the opinion itself . . . ." 103 S. Ct. at 3476 (emphasis added). In a footnote to this language, the Court added: "It is not unusual for us to employ certain *presumptions* in deciding jurisdictional issues." *Id.* at 3477 n.8 (emphasis added). Justice Blackmun disagreed with the Court's approach: "I do not join the Court, in Part II of its opinion, in fashioning a new *presumption* of jurisdiction over cases coming here from state courts." *Id.* at 3483 (Blackmun, J., concurring in part and concurring in the judgment)(emphasis added). Justice Stevens also objected: "I cannot accept the Court's decision to . . . *presume* that adequate state grounds are intended to be dependent on federal law unless the record plainly shows otherwise." *Id.* at 3489 (Stevens, J., dissenting)(emphasis added). "Even if I agreed with the Court that we are free to consider as a fresh proposition whether we take *presumptive* jurisdiction over the decisions of sovereign states, I could not agree that an expansive attitude makes good sense." *Id.* at 3490 (Stevens, J., dissenting)(emphasis added).

In light of what the Court said and did in the case, it is surprising that a commentator would assert that "*Michigan v. Long* does not *presume* jurisdiction. Nor should it be viewed as an attempt to stretch jurisdiction." Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079, 1097 (1984)(emphasis in original). If by this statement all that is meant is that the Court's jurisdiction rests on a number of other conditions required by Article III (like case or controversy), then it states no more than the obvious. If not, the statement is certainly mistaken. (This mistake is surprising given Professor Schlueter's familiarity with the Court and given his able service under the Chief Justice as well as the occasional assistance he extended to Justice O'Connor, the author of *Long*).

For further discussion of the use of presumptions in deciding the basis of a state court decision, see South Dakota v. Neville, 103 S. Ct. 916, 925-26 (1983)(Stevens, J., dissenting).

[84] Collins, *supra* note 81, at col. 2 (quoting Professor Tribe).

[85] For a discussion of the Court's new interest in reviewing state court decisions *upholding* a claim that state authorities have violated a person's rights, see Michigan v. Long, 103 S. Ct. 3469, 3490-92 (1983)(Stevens, J., dissenting). In *Long*, Justice Stevens observed:

> Until recently we had virtually no interest in cases of this type. Thirty years ago, this court reviewed only one . . . . Fifteen years ago, we did not review any such case, although the total number of requests had mounted to three. [Footnote omitted.] Some time during the past decade, . . . our priori-

of Supreme Court jurisdiction in certain state cases coming to the Court may be overcome where a state court has made it "clear by a plain statement in its judgment or opinion that the federal cases [cited] are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached."[86] Without sparing any adjectives, Justice O'Connor's *Long* opinion added: "If the state decision indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."[87]

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ties shifted. The result is a docket swollen with requests by states to reverse judgments that their courts have rendered in favor of their citizens.

Id. at 3491. *See also* Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819, 823-33 (1983)(discussing Burger Court record of reviewing state decisions that take an expansive view of civil liberties protections).

[86] 103 S. Ct. at 3476. As has been noted, see *supra* note 82, the Oregon Supreme Court took this approach in an opinion released the same day as *Michigan v. Long*. *See* State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1321 (1984). Other courts have availed themselves of the plain statement doctrine. *See, e.g.*, Hellar v. Cenarrusa, 106 Idaho 586, 682 P.2d 539, 543 (1984)(plain statement asserting independent character of state law); Cannaday v. Mississippi, 455 So. 2d 713, 722 (Miss. 1984)(plain statement that although federal decisions used for guidance, state jurisprudence compels result).

[87] 103 S. Ct. at 3476 (emphasis added). Despite this admonition, Justice O'Connor added an enigmatic footnote: "There may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action." *Id.* at n.6. On the question of what constitutes a "bona fide" state ground, see Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A. J. 92, 94 (1984).

The potential reach of *Long* is suggested by the Rhode Island Attorney General's petition for certiorari in the celebrated first *Von Bulow* case. The state challenged the judgment of its supreme court despite the following "plain statement" by that court:

> Even were we to hold that defendant's Fourth Amendment rights had not been violated . . . , our own constitutional prohibition against unreasonable searches and seizures mandates that the evidence obtained . . . be suppressed. Article I, sec. 6, of the Rhode Island Constitution is an alternative, independent foundation upon which we rest our holding . . . . That section constitutes "bona fide separate, adequate, and independent grounds," . . . upon which we base our decision . . . .

State v. Von Bulow, 475 A.2d 995, 1019 (R.I. 1984), *cert. denied*, 105 S. Ct. 233 (1984). The state, however, argued:

> The Petitioner recognizes that the Rhode Island Supreme Court's citation of the state constitution gives rise to an inference that the court's judgment is supported by state law. Nevertheless, Petitioner claims that this portion of the Court's opinion is dependent upon the court's federal law analysis and that the state law theory cannot stand alone to support the court's judgment . . . .

The Court defended its new approach to taking jurisdiction over state court cases while asserting its "[r]espect for the independence of state courts . . . ."[88] As Justice Stevens noted, the Court's position is baffling.[89] Certainly, if the Court wanted to

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The Petitioner submits that the state law issue in this case is inadequate to support the judgment of the Rhode Island Supreme Court.

Petition for Certiorari, Rhode Island v. Von Bulow, No. 84-106, at 22, 27.

The Supreme Court, perhaps in part because of the thoughtful and commanding reply brief filed by Professor Alan Dershowitz, denied certiorari. *See* Rhode Island v. Von Bulow, 105 S. Ct. 233 (1984).

Michigan v. Long can safely be said to invite this kind of argument on the part of the state. That is, the *Long* Court has signaled its willingness to test even the adequacy of a state court opinion affirming some right claimed under state law. The Rhode Island Attorney General's attempt in *Von Bulow* could mark the beginning of efforts by state officials to urge Supreme Court scrutiny of the "adequacy" of the state law grounds on which a decision is based despite the presence of a "plain statement" in the state court opinion. If so, Professor William Cohen is entirely correct in stating that such a response to *Long* "would be a startling development." *See* Collins, *supra* note 81, at 5, col. 4.

[88] 103 S. Ct. at 3475. This statement can be understood as ironic when one considers what Justice White (joined by Chief Justice Burger and Justice O'Connor) said in a subsequent opinion concurring with the dismissal of certiorari in Colorado v. Nunez, 104 S. Ct. 1257, 1257 (1984). In *Nunez,* the Court withdrew its jurisdiction because the judgment of the court below rested on independent and adequate state grounds. *Id.* at 1257. (It is noteworthy that the Court initially assumed jurisdiction, Colorado v. Nunez, 104 S. Ct. 65 (1983), over a case in which the state supreme court had not even cited a single federal authority. *See* People v. Nunez, 658 P.2d 879 (Colo. 1983), *cert. dismissed,* 104 S. Ct. 1257 (1984)). Despite *Long*'s assertion of "[r]espect for the independence of state courts," Justice White, joined by his two *Nunez* colleagues, issued an advisory opinion on the merits of the case under federal law, though he conceded that "the challenged judgment rests solely on state law grounds and that this Court [therefore] lacks jurisdiction to review it." *Id.* at 1259 (White, J., concurring). What the White-Burger-O'Connor block did in *Nunez* belies the Court's comment in *Michigan v. Long* that the "plain statement" approach would "avoid the danger of [its] rendering advisory opinions." *See* 103 S. Ct. at 3476. For another example of a gratuitous opinion, see Florida v. Casal, 103 S. Ct. 3100, 3100 (1983)(Burger, C.J., concurring in dismissal of certiorari)(discussing Florida law on which state court decision rested and pointing out that state provisions construed to provide greater protection than federal Constitution can be amended). For a state judge's response to the *Casal* opinion, see State v. Jackson, 672 P.2d 255, 264 (Mont. 1983)(Shea, J., dissenting)("The danger of [the Court's] intrusionary [review] policy is fully exemplified by the arrogance of a concurring opinion in *Florida v. Casal.* . . .Chief Justice [Burger] would have state governments amend state constitutions and statutes to march lock-step with judicial pronouncements of the United States Supreme Court."). Do not opinions like *Nunez* and *Casal* invite this kind of response and thereby intensify tensions between the federal and state judiciaries?

[89] 103 S. Ct. at 3492 (Stevens, J., dissenting). "I am thoroughly baffled by the Court's suggestion that it must stretch its jurisdiction and reverse the judgment of the Michigan Supreme Court in order to show '[r]espect for the independence of state courts.' " *Id.*

accord due respect for state court autonomy, it could have employed a less intrusive presumption. That is, the Justices could have announced a rule declaring that a state decision that vindicates a civil liberties claim not in conflict with federal law will not be reviewed unless there is a "plain statement" that state law does *not* provide the relief sought.[90] Such a rule, instead of compelling state judges to disavow reliance on federal law, would have the virtue of urging them to assert reliance on state law. Unlike the *Long* rule, the suggested approach is compatible with what I have called "the logic of the fourteenth amendment."[91] For example, when the United States Supreme Court assumed jurisdiction in *South Dakota v. Neville*,[92] over Justice Stevens' dissent, it likewise had to assume that the admission into evidence of a defendant's refusal to submit to a blood-alcohol test did *not* violate that state's constitution. If the challenged law did violate the state constitution (as the South Dakota Supreme Court had held), then how could it be said that South Dakota had violated the command of the fourteenth amendment prohibiting any state from depriving a person of his or her liberty? After all, state law had not conclusively deprived any persons of their rights under the fourteenth amendment since the state court had found the challenged practice to be legally unenforceable under state law. That is exactly what the South Dakota Su-

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[90] *Cf.* Oregon v. Hass, 420 U.S. 714, 729 (1979)(Marshall, J., dissenting)(no federal review of state decision unless court has resolved all state law issues against defendant and federal Constitution demands reversal); Galie & Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in* Oregon v. Hass, 82 DICK. L. REV. 273, 277-89 (1978)(discussion of Marshall proposal). This view is also suggested by Justice Stevens' concurring opinion in Massachusetts v. Upton, 104 S. Ct. 2085, 2089 (1984). For a discussion of Justice Marshall's new attitude toward the use of state law, see *supra* note 15. *See also* Linde, *supra* note 58, at 383 n.10 (1980)(suggesting that *federal courts* should also examine *state* constitutional guarantees when state action is attacked on federal constitutional grounds).

[91] *See supra* note 58.

[92] 103 S. Ct. 916 (1983). In *Neville*, which was decided before *Michigan v. Long*, the South Dakota high court held that a state statute violated both the state and federal constitutions. State v. Neville, 312 N.W.2d 723, 726 (S.D. 1981). In assuming jurisdiction, a majority of the Supreme Court determined that the state court decision had not rested on an independent state ground, finding that the state court had concluded that the statute violated the fifth amendment and "simply assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege." 103 S. Ct. at 919 n.5.

preme Court said nearly a year later when the case came back to it on remand from the United States Supreme Court.[93]

In order to better effectuate its proclaimed respect for state court autonomy, the Court might instead make its jurisdiction dependent upon a showing that state law could not provide the relief granted. Operationally, this would shift the burden to the state to obtain from the state reviewing court a disclaimer as to any reliance on state law. Under *Long*, by contrast, it is the rights claimant who must shoulder the responsibility of securing a "plain statement" in order to preclude subsequent federal review of a favorable decision.[94] Under this rule state officials are encouraged to minimize the importance of state law in order to preserve *further* review in case they are dissatisfied with the state court decision. Conversely, under the suggested approach, state officials are encouraged to stress the importance of state law and thereafter to accept as final any state court-state law judgment honoring a rights claim. This approach would help to reduce what Justice Stevens correctly regards as "an encroachment by [the United States Supreme] Court into the territory that should be reserved for state judges."[95]

Elsewhere I have referred to several of the practical problems that *Michigan v. Long* can safely be said to invite.[96] Without returning to that subject, it may be helpful to offer at least one more generalization about the case and its anticipated impact on adjudication in the state courts. That the Court has

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[93] *See* State v. Neville, 346 N.W.2d 425 (S.D. 1984). What the South Dakota Supreme Court did on remand in *Neville* is not surprising in light of what that court had declared earlier in another remand case. *See* State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976)("We have always assumed the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution."). Given that statement, why shouldn't any reference to the South Dakota Constitution be presumed to be independent of federal law? Is not this presumption just the other side of the argument advanced by the Supreme Court in Delaware v. Prouse, 440 U.S. 648, 652 (1979), where it assumed jurisdiction owing to the existence of prior state precedent that had made state law dependent on its federal counterpart?

[94] *Cf.* South Dakota v. Neville, 459 U.S. 553, 568-69 & n.4 (1983)(Stevens, J., dissenting)(arguing that absent a contrary indication in the state court opinion, an adequate state ground should be presumed to be independent since party seeking reversal has burden of establishing Court's jurisdiction).

[95] Massachusetts v. Upton, 104 S. Ct. 2085, 2090 (1984)(Stevens, J., dissenting).

[96] *See* Collins, *supra* note 87; Collins, *supra* note 81, at col. 2-4.

been troubled by what Justice O'Connor referred to in *Long* as the "considerable body of 'federal law' " created by state courts and the "recent significant expansion" of that law[97] can be seen from the Court's certiorari record.[98] In its eagerness to patrol the outer boundaries of the Bill of Rights, the *Long* Court indicated a willingness to monitor even those state cases that "used federal law to *guide* their application of state law . . . ."[99] Though *Long* cannot really ensure uniformity of state court application of federal law,[100] the Court has positioned itself so that it may more closely monitor the increasing number of state decisions building on Warren Court precedents. More than anything else, it is the *application* of Warren Court doctrines to new circumstances which has met with the Burger Court's disapproval.[101]

The signal the Court is sending to its state counterparts is that decisional certainty in vindicating rights will not occur unless state courts either abandon reliance on federal decisional law or openly repudiate any such reliance. True, a state court may, under *Long,* employ federal law "for the purpose of guidance,"[102] but if it does it must comply with the formalisms imposed by the Court, and even then mechanical compliance may not be deemed "adequate" to preclude assumption of federal jurisdiction over the case.[103] This procedural uncertainty, combined with the Burger Court's substantive law handiwork in cases like *New York v. Quarles*[104] and *Massachusetts v. Shep-*

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[97] 103 S. Ct. at 3477 n.8.

[98] *See supra* note 85.

[99] 103 S. Ct. at 3477 n.8 (emphasis added).

[100] *See supra* note 68.

[101] *See generally* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983).

[102] 103 S. Ct. at 3476.

[103] *See supra* note 87.

[104] 104 S. Ct. 2626 (1984). *Quarles* illustrates that state court reliance on federal constitutional doctrine, no matter how well established and seemingly clear, can destroy the "finality" of its judgment, a result that obviously undermines respect for state courts.

The Court in *Quarles* created a "public safety" exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence. *See* 104 S. Ct. at 2632. Only a year before *Quarles,* author Liva Baker could say of the 1966 landmark *Miranda* decision:

> *Miranda* had endured attacks from every segment of the public. It had been maligned by candidates for high political office and by those already holding high political office. It had been buffeted by judges, by prosecutors, and by

pard,[105] evidences the dubiousness of a primary reliance by state courts on federal law, especially in the criminal procedure area.[106]

One may more readily understand the import of *Long* and the general posture of the Burger Court in the individual rights area by examining the viability of the "interstitial model" of judicial review advanced by the editors of the *Harvard Law Review*.[107] According to this model, federal constitutional law must

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police. Scholars had kicked it around academe. More than a decade later even the man in the street still held definite opinions about the ruling. Some of the attacks had been intellectual, reasoned, and well intentioned; others had been emotional and unreasoned, their only purpose the advancement of a candidacy or an avenging assault on the United States Supreme Court. *Miranda* had also been defended and enforced, not always perfectly by any means and not in every case by every prosecutor and every police officer and every judge. But enough. And there had been judges and police officers and district attorneys who had not believed in either its legality or its morality, but they obeyed it. Their loyalty was to the law, and *Miranda* had survived.

L. BAKER, MIRANDA: CRIME, LAW & POLITICS 408 (1983). Even the foremost authority on police confessions law had not anticipated the Burger Court's turnabout in *Quarles*. *See* Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 90-91 (1983); *cf.* Kamisar, *The Swing of the Pendulum*, THE NATION, Sept. 29, 1984, at 271, 274 (Burger Court implied that *Miranda* is balance between fifth amendment and societal costs, though on "balance" the fifth amendment more frequently loses).

[105] 104 S. Ct. 3424, 3428-29 (1984). The Court in *Sheppard* created a "good faith" exception to the federal exclusionary rule in certain cases involving issuance of a warrant. For a thoughtful analysis of the problems created by such a "good faith" exception to the exclusionary rule, see Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 608-15 (1984). For a state court's rejection of the "good faith" exception, see *infra* note 134.

[106] It should be noted that both *Quarles* and *Sheppard* involved instances where the Supreme Court reversed the judgments of state high courts which had sustained the right claimed on the basis of *federal* law. Where the limits of federal constitutional provisions seem more clearly drawn, state high courts may be more willing to apply their view of that law than to assume responsibility for determination and application of state law. *See* Commonwealth v. Upton, 390 Mass. 562, 458 N.E.2d 717, 723-24 (1983)(relying on fourth amendment decisions and declining to interpret state Declaration of Rights provision). Quite apart from any doctrinal arguments, *see supra* note 58, is this practice fair to the litigant who relies on the state court to apply state law? *See* State v. Badger, 141 Vt. 430, 450 A.2d 336, 346-47 (1982)(noting peril to defendant's case if state ruling is based on federal law alone). Given the Burger Court's certiorari policy, *see supra* note 85, is it fair to the nation? After all, both *Quarles* and *Sheppard* clearly reduce the degree of constitutional protection previously recognized by the Court.

[107] *See Developments in the Law—The Interpretation of State Constitutional*

be regarded by the state courts as dominant. Further, since federal doctrine acts as a "settled floor" of rights, the primary function of state courts is to supplement[108] and otherwise "fill in the spaces left open by federal constitutional doctrine" as announced by the United States Supreme Court.[109] The model presumes (1) a generally liberal application of the Bill of Rights to the states, and (2) a deferential attitude on the part of the Court in its review of state court assertions of reliance on state law.[110] It is in that context that state courts are invited to "fill in the gaps" in the handful of instances where the Court veers from either well-settled precedent or well-regarded principles of judicial review. That model, however, simply does not square with the new reality, namely, the reality of a Court that countenances dismantlement of the criminal justice edifice constructed by the Warren Court.[111] Moreover, the interstitial model is at odds with the Burger Court's invasive certiorari policy of review of state court civil liberties decisions. *Michigan v. Long* is one case among several[112] which illustrates the accuracy of these two assertions. First, the *Long* Court assumed jurisdiction in the case despite the fact that the Michigan Supreme Court had an-

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Rights, 95 HARV. L. REV. 1324, 1356-59 (1982) [hereinafter cited as *Developments*].

[108] *Id.* at 1357-58.

[109] *Id.* at 1356.

[110] *See id.* at 1357-58.

[111] The Court's abandonment of the *Aguilar-Spinelli* probable cause standards is but one example of this development. *See* Illinois v. Gates, 103 S. Ct. 2317, 2332 (1983). For other illustrations, see *supra* notes 104, 105 and accompanying text.

What has been said about privacy rights and equality in public school financing holds at least equally true in criminal justices cases: "As state judges develop the meaning of state constitutions in response to the Burger Court's incipient halt to expansion of federal privacy rights and withdrawal from education financing disputes, *state doctrine may come to look less like and to rely less often on federal law.*" *Developments*, *supra* note 107, at 1460 (footnote omitted and emphasis added).

[112] *See, e.g.*, Montana v. Jackson, 103 S. Ct. 1418, 1418 (1983)(state judgment vacated and case remanded for determination as to whether judgment rested on state grounds); South Dakota v. Neville, 103 S. Ct. 916, 919 n.5 (1983)(determination that state judgment did not rest on independent state grounds so as to preclude federal review); Delaware v. Prouse, 440 U.S. 648, 652 (1979)(assumption of jurisdiction where state decision not expressly based on independent state grounds); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566-67 (1977)(use of federal precedent permitting Supreme Court to presume federal law basis for state decision); Ohio v. Gallagher, 425 U.S. 257, 259 (1976)(same).

nounced its holding by explicit reference to its state constitution.[113] The Burger Court's assumption of jurisdiction in *Long* might have been anticipated by its decisions in *Delaware v. Prouse*[114] and *Zacchini v. Scripps-Howard Broadcasting Co.*[115] The creators of the interstitial model considered those cases to represent a "significant expansion" of the Court's certiorari powers over the states.[116] Viewed in that light, *Long* must represent the near-ultimate expansion of the Court's power in this area. Second, the substantive law holding of *Long* is typical of the Burger Court's tendency to give a narrow reading to Warren Court criminal justice precedents, in this case to the limits placed on police searches by *Terry v. Ohio*.[117] Other cases go well beyond the *Long* approach and either repudiate precedents[118] or significantly undermine them.[119]

These considerations — especially the Supreme Court's certiorari policy — should result in an increased reliance on state law by the practicing bar. State judges can expect to receive more demands to base all of their civil liberties decisions entirely on state law grounds from practitioners sensitive to the prospect of federal court reversal or malpractice lawsuits.[120] As a result, it will be considerably more difficult for state judges to

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[113] *See* People v. Long, 413 Mich. 461, 320 N.W.2d 866, 870 (1982)(search of vehicle proscribed by federal Constitution *and* by art. 1, § 11 of state constitution).

[114] 440 U.S. 648 (1979).

[115] 433 U.S. 562 (1977); *see* Michigan v. Long, 103 S. Ct. at 3477 n.8 (*Long* rule foreshadowed by *Prouse* and *Zacchini*).

[116] *Developments, supra* note 107, at 1341. Consistent with my view of the presumptions of this model, *see supra* text accompanying note 110, subsequent editors of the *Harvard Law Review* took issue with the *Long* Court's basis for asserting jurisdiction over state cases. *See The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 224-30 (1983)(questioning premise implied in *Long* "that the contributions of state and federal sources of law to a given decision are neatly distinguishable").

[117] 392 U.S. 1 (1968).

[118] *See, e.g.*, Illinois v. Gates, 103 S. Ct. 2317, 2320 (1983)(abandoning *Aguilar-Spinelli* standard for determining probable cause).

[118] *See, e.g.*, New York v. Quarles, 104 S. Ct. 2626, 2632 (1984)(establishing "public safety" exception to *Miranda* requirement); United States v. Leon, 104 S. Ct. 3405, 3420 (1984)(permitting "good faith" exception to exclusionary rule in warrant context). *See generally* Tribe, *Court Weighs Principles and Finds Them Wanting*, L. A. Times, July 22, 1984, Pt. IV, col. 4 (criticizing Burger Court's "balancing"/"cost-benefit" approach to decision-making).

[120] *Cf. supra* text accompanying note 81.

apply state law selectively depending on the presumed scope of federal law. The interstitial model, at times adhered to by the New Jersey Supreme Court,[121] will soon enough receive a chilly reception from attorneys who have come to realize that even a New Jersey Supreme Court decision vindicating a right on *federal* grounds may be of little value after 113 days—the time it took in one New Jersey case for the Court to grant certiorari.[122] The model is unstable if only because it places an unreasonable demand on the bar to set aside state law to the client's detriment and expense.[123]

The revival of interest in state law that I have described can be seen in part as one of the consequences of the court's jurisdictional handiwork in *Long*. Important as that result may be, the *Long* Court could have achieved its stated purpose by employing a jurisdictional presumption far less hostile to state court autonomy and likewise far more compatible with the logic of the fourteenth amendment.[124] After *Long*, state judges will have to be far more circumspect in their reliance on federal decisional law[125] and far more receptive to developing a body of doctrinally independent state law. This approach to state law decision-making has both advantages and disadvantages.[126] In sum, *Long* and

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[121] *See* Pollock, *State Constitutions As Separate Sources of Fundamental Rights*, 35 RUT. L. REV. 705, 716-17 (1983)(use of state constitution to invalidate discriminatory zoning ordinance).

[122] *See* State *ex rel.* T.L.O. 94 N.J. 331, 463 A.2d 934, 939 (Aug. 8, 1983), *cert. granted sub nom.* New Jersey v. T.L.O., 52 U.S.L.W. 3413 (Nov. 29, 1983), *rev'd*, 105 S. Ct. 733, 747 (Jan. 15, 1985).

[123] That a state court operating under the premises of the interstitial model can never be assured that its determination of a party's rights under federal law will have finality should by now be obvious. The *Quarles* and *Sheppard* cases are but two further examples. *See supra* notes 104-05.

[124] *See supra* text accompanying note 90.

[125] *Cf.* Comment, *State Court Constitutional Decisionmaking*, 1983 ANN. SUR. AM. L. 277, 301-02 (suggesting that *Long* encourages state court judges to obfuscate significance of federal law in their decisions); *Developments, supra* note 107, at 1340-41 (state courts' efforts to maintain independence from federal review by refusing to incorporate federal constitutional concerns will occur at the cost of substantive legitimacy).

[126] *See, e.g., Developments, supra* note 107, at 1336, 1448, 1460, 1496 (allows state and federal constitutional doctrine to be interwoven); Collins, *supra* note 15, at 8 (allows opportunity for state courts to create own standards); Linde, *supra* note 6, at 197-99 (permits judicial review of state constitutions); Utter, *supra* note 72, at 493-94 (creates greater protection for individual rights under state constitution).

its progeny reveal that the present Supreme Court is not about to assume the dominant role in *protecting* individual rights. Thus, that responsibility could well shift to state courts.

C. *Horizontal Federalism and Persuasive State Precedents*

> Although discussions of federalism typically focus on interactions between state and national governments, interactions among the American states are an equally important component of the federal relationships and contribute to policy development throughout the states.
>
> —Mary Cornelia Porter & G. Alan Tarr[127]

If a high court in the southern portion of the United States had to decide whether a minor has a cause of action for a parent's incapacitation, where would that court turn for guidance in the absence of precedents of its own? Obviously it would feel no hesitation in consulting the decisions of other state appellate courts.[128] So customary is this common law practice that it is hard to imagine a state high court venturing to resolve a products liability issue without at least consulting Justice Roger Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Co.*[129] The same holds true with questions of contract, property and criminal law. Why should the case be any different when it comes to questions of state constitutional law?[130]

Justice Robert Jackson, among others, could be counted on

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[127] STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM xxi (Porter & Tarr eds. 1982) [hereinafter cited as STATE SUPREME COURTS].

[128] *See, e.g.*, Northwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 652 P.2d 318, 320-22 (1982)(examining Massachusetts, Kansas, California, Michigan and Iowa Supreme Court cases).

[129] 24 Cal. 2d 453, 150 P.2d 436, 441-44 (1944)(Traynor, J., concurring); *cf.* Fruehauf Corp. v. Trustees of First United Methodist Church, 387 So. 2d 106, 109 (Miss. 1980)(citing *Escola v. Coca-Cola Bottling Co.*).

[130] Of course, a comparative approach to judicial decision-making presumes an underlying awareness of the fact that differences in text or history may compel different results in different states. *See* Linde, *supra* note 6, at 173 (state supreme courts too often receive precedent from other states without regard to differences in written law of other states).

to defend the proposition that recognition of the finality of United States Supreme Court interpretations of federal law does not carry with it a corresponding obligation to accede to the infallibility of those opinions.[131] Nevertheless, in post-incorporation America state judges turn to United States Supreme Court opinions as if they were the *only* opinions on constitutional law. This sort of vertical influence might be contrasted with horizontal influence.[132] The latter refers to the practice of looking to other states' decisional law for guidance.

To illustrate, at a time when there is so much controversy and confusion over the exclusionary rule, does it make sense to limit one's focus to what a single court, albeit the United States Supreme Court, has recently said on the subject? The point is not that federal decisions should be ignored, but rather that there may be other ways to analyze an issue which may prove to be more persuasive. When the Supreme Court of Mississippi is called upon to decide whether to retain or revise the exclusionary rule in search and seizure cases arising under the state constitution, should it not consider Justice Traynor's opinion in *People v. Cahan,*[133] in addition to anything found in federal de-

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[131] *See* Brown v. Allen, 344 U.S. 443, 540 (1953)(Jackson, J., concurring). Justice Jackson put it better when he wrote:

> Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Id.

[132] *See* STATE SUPREME COURTS, *supra* note 127, at xix-xxii.

[133] 44 Cal. 2d 434, 282 P.2d 905, 910-11 (1955)(expressing pros and cons of exclusionary rule). The doctrine requiring the exclusion from trial of evidence obtained through a violation of the defendant's constitutional rights is at least as well rooted in state constitutional law as in fourth amendment jurisprudence. *See, e.g.,* Tucker v. State, 128 Miss. 211, 223, 90 So. 845, 848 (1922)(adopting exclusionary rule under state law 27 years prior to incorporation of the fourth amendment by Wolf v. Colorado, 338 U.S. 25 (1949)); State v. Davis, 295 Or. 227, 666 P.2d 802, 805-07 (1983)(outlining state law basis of exclusionary rule). *See generally* Dix, *Exclusionary Issues as Matters of State Law,* 11 AM. J. CRIM. L. 109, 112 (1983)(discussion of state exclusionary rule issues); Hancock, *State Activism and Searches Incident to Arrest,* 68 VA. L. REV. 1085, 1085-86 (1982)(stating that Supreme Court "can no longer be considered the sole custodian of search and seizure theory").

cisional law?[134]

There is no sound reason for state courts not to look to one another for guidance in the constitutional law area just as they do in civil and criminal law. In all likelihood, *Michigan v. Long* will increase the incidence of this practice.

Inter-state communication between courts is especially instructive either where there is a state guarantee with no federal analogue or where there are textual differences between the federal and state constitutions. Two examples of these situations are the "abuse" provisions contained in most state freedom of expression guarantees[135] and right to bear arms provisions that are worded differently from the second amendment to the United States Constitution.[136] The benefits of inter-state communication are not limited, however, to these two categories of

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[134] In its most recent important exclusionary rule decision, released in early 1985, the Mississippi Supreme Court, relying exclusively on state law, expressly refused to adopt for its exclusionary rule the federal "good faith" exception approved in *United States v. Leon*, 104 S. Ct. 3405, 3420 (1984). *See* Stringer v. State, No. 54,805, slip. op. at 14-15 (Miss. Feb. 27, 1985). The Mississippi court did not cite *Cahan* or the decisions of any other state. Instead, it relied on past Mississippi decisions.

[135] *See, e.g.*, GA. CONST. art. I, § 1 ¶ 5: "No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that liberty." The following five state constitutional provisions are representative of the 42 state constitutions containing abuse provisions in their freedom of speech guarantees: ALA. CONST. art. I, § 4; CAL. CONST. art. I, § 2; MINN. CONST. art. I, § 3; N.Y. CONST. art. I, § 8; VA. CONST. art. I, § 12. This type of freedom of speech guarantee appeared as early as 1790 in Article IX, § 7 of the Pennsylvania Constitution of 1790. *See also* Anastaplo, *supra* note 1, at 441 n.10 (noting French origins of provision); Collins, *Bills & Declarations of Rights Digest*, *supra* note 52. For thoughtful contemporary interpretations of one state's "abuse" clause, see the following decisions rendered by the Oregon Supreme Court: Committee of 1000 v. Eivers, 296 Or. 195, 674 P.2d 1159, 1166 n.1 (1983)(Linde, J., concurring); *In re* Lasswell, 296 Or. 121, 673 P.2d 855, 857 (1983); State v. Robertson, 293 Or. 402, 649 P.2d 569, 576 (1982); Hall v. May Dep't Stores, 292 Or. 131, 637 P.2d 126, 134-36 (1981); Wheeler v. Green, 286 Or. 99, 593 P.2d 777, 788 (1979).

[136] *See, e.g.*, MISS. CONST. art. III, § 12: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." This and other state right-to-bear-arms guarantees are thoroughly discussed in Dowlut & Knoop, *State Constitutions and The Right To Keep and Bear Arms*, 7 OKLA. CITY U.L. REV. 177 (1982); Collins, *Bills & Declarations of Rights Digest*, *supra* note 52. For comparison of the Mississippi right-to-bear-arms provision with the second amendment to the United States Constitution, as well as listing and comparison of other textual differences between rights provisions in the federal and state constitutions, see *supra* notes 50-52.

cases. Even where the wording of the state and federal provisions is identical or similar, state judges may, after thorough analysis, find reason to take the approach the Arizona Supreme Court recently did in a double jeopardy case when it found the more convincing view in an Oregon state court opinion, notwithstanding the existence of a relatively new federal precedent.[137] There will also be occasions when there is no Supreme Court precedent that addresses the particular issue to be decided under state law.[138] Where there is no corresponding federal law to consider, interpretation of provisions such as state constitutional remedies guarantees[139] may take into account the disparate views of, say, the Florida[140] and Connecticut[141] supreme

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[137] *See* Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261, 272 (1984). In *Pool* the defendant had obtained a mistrial as the result of improper conduct by the prosecution. *Pool,* 677 P.2d at 264-65. The Arizona court considered the double jeopardy standards enunciated by both the United States Supreme Court and the Oregon Supreme Court. *Id.* at 267-68. The federal rule would have barred retrial only when the prosecution intended its misconduct to result in reversal. Oregon v. Kennedy, 456 U.S. 667, 679 (1982). The Oregon court adopted a more restrictive rule which barred retrial when the prosecution either intended or was indifferent to conduct necessitating a retrial or reversal. State v. Kennedy, 295 Or. 260, 273, 666 P.2d 1316, 1325-26 (1983). In the case before it, the Arizona Supreme Court concluded that a rule broader than that adopted by the United States Supreme Court was necessary to protect against certain types of prosecutorial misconduct and followed the view of the Oregon Supreme Court in adopting an interpretation of the Arizona Constitution that was more protective than that of the United States Constitution as interpreted in *Oregon v. Kennedy. Pool,* 677 P.2d at 270-72.

[138] *See* Oberg v. City of Billings, 674 P.2d 494, 494 (Mont. 1983)(statute allowing use of lie detector as employee screening device held violative of state equal protection clause); *In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738, 742 (1983)(state privacy right guarantees terminally ill person right to refuse life-sustaining treatment; no federal case on the issue; sister states' decisions looked to for guidance).

[139] The following are representative of the 35 state constitutions which protect various aspects of one's right to a remedy at law: ARK. CONST. art. II, § 13; FLA. CONST. art. I, § 21; KAN. CONST. Bill of Rights, § 18; MISS. CONST. art. III, § 24; TENN. CONST. art. I, § 17. This guarantee appeared as early as 1776 in the constitutions of Delaware (§ 12) and Maryland (art. XVII). *See* II THE ROOTS OF THE BILL OF RIGHTS 277, 281 (B. Schwartz, ed. 1980); Collins, *Bills & Declarations of Rights Digest, supra* note 52, at 2511.

[140] *See* Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973)(striking down no fault insurance law); *see also* Jackson v. Mannesmann Demag Corp., 435 So. 2d 725, 729 (Ala. 1983)(statute of repose struck down); White v. State, 661 P.2d 1272, 1275 (Mont. 1983)(statute limiting government liability for torts struck down); Heath v. Sears, Roebuck & Co., 464 A.2d 288, 296 (N.H. 1983)(statute of limitations struck down); Kennedy v. Cumberland Eng'g Co., 471 A.2d 195, 198 (R.I. 1983)(same); Mickelsen, *The Use and Interpretation of Article I, Section Eight of the Minnesota Constitution of 1861 - 1984,* 10 WM. MITCHELL L. REV. 667 (1984). *See generally* Collins, *State Courts Turn Their*

courts. A similar approach might also be taken with respect to state guarantees pertaining to keeping the administration of justice open to the public[142] or on constitutional protections associated with "rights retained" guarantees.[143]

Attention to Issues of Rights and Remedies, Nat'l L.J., Feb. 20, 1984, at 21, col. 1 (inquiring as to whether recent cases indicate beginning of "economic constitutionalism").

[141] *See* Gentile v. Altermatt, 169 Conn. 267, 363 A.2d 1, 11 (1976)(upholding no fault insurance law); *see also* Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913, 916 (1982)(upholding medical malpractice statute of repose). *See generally* Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to Courts*, 63 NEB. L. REV. 150, 159 (1984)(discussion of *Colton*).

[142] *See, e.g.*, State *ex rel.* Oregonian Publishing Co. v. Deiz, 289 Or. 277, 613 P.2d 23, 27 (1980)(juvenile court proceedings open to public); KFGO Radio, Inc. v. Rothe, 298 N.W.2d 505, 510 (N.D. 1980)(state attorney's inquiry open to public); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 550 (W. Va. 1980)(pretrial hearings open to public).

[143] *See, e.g.*, MISS. CONST. art. III, § 32: "The enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people." Thirty-three other state constitutions contain similar provisions. *See* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 44 n.142 (B. McGraw ed. 1985).

One of several problems raised by judicial enforcement of this guarantee is that if a right is indeed so basic as to be retained, why then was it omitted from inclusion in the original document and subsequent amendments? One answer was offered in 1928 by then Mississippi Supreme Court Justice George Ethridge:

> It is a general rule of both legal and constitutional construction that the enumeration of a number of things in a law or a section of the constitution by implication excludes the things not named therein, on the theory that when the legislature or the constitutional convention makes an enumeration in reference to a given thing, it names all the things that it desired to be embraced in the enumeration. That if it had other things in mind it would have named them. *The principal thing the [Mississippi constitutional] convention had in mind was to prevent this rule of construction being adopted by the courts in reference to the bill of rights.* The [rights retained]e section however plainly implies that there are other reserved rights retained by or *inherent* in the people which the legislature could not impair.

ETHRIDGE, *supra* note 24, at 154 (emphasis added). For discussion of the "rights retained" guarantee, see State v. Newton, 291 Or. 788, 636 P.2d 393, 414 n.3 (1981)(Linde, J., dissenting)(quoting Oregon right retention clause); Hall v. Northwest Outward Bound School, Inc., 280 Or. 655, 572 P.2d 1007, 1010-11 n.11 (1977)(right retained must be recognized and of constitutional magnitude); *In re* J.P., 648 P.2d 1364, 1373 (Utah 1982)(parental rights retained).

Justice Ethridge's comments raise some challenging questions regarding the application of Mississippi's rights retained guarantee and the principle of equality. For example, the 1817 Mississippi Constitution provided: "That all freemen, when they form a social compact, are equal in rights, and that no man or set of men, are entitled to exclusive, separate public emoluments or privileges, from the community, but in consideration of public services." MISS. CONST. OF 1817 art. I, § 1, *reprinted in* UNIVERSITY OF MISSISSIPPI BUREAU OF GOVERNMENTAL RESEARCH, CONSTITUTIONS OF MISSISSIPPI AS ORIGINALLY

Horizontal influence, or inter-state communication, is likely to become the reality of the 1980's. The real question is not whether but how this will happen. At present, the problem has much to do with the lack of availability of legal research resources conducive to making this idea altogether feasible.[144]

ADOPTED 2 (1982) [hereinafter cited as CONSTITUTIONS]. That provision was retained in the Mississippi Constitution of 1832, *see* CONSTITUTIONS, *supra*, at 22, but was deleted from the state constitution of 1869, *see id.* at 43, and is similarly absent from the present constitution adopted in 1890, *see id.* at 71. Moreover, the 1890 Mississippi Constitution provides: "The adoption of this constitution shall not have the effect, nor shall it be construed, to revive or put in force any law heretofore abrogated or repealed." MISS. CONST. art. XV, § 285. Today, the Mississippi Constitution contains no express equality guarantee like those found in most state constitutions and in the fourteenth amendment to the United States Constitution. *But cf.* MISS. CONST. art. IV, § 94 (equality of rights between sexes regarding disposition of property). Likewise, six other states have no express equality guarantee in their declarations of rights. The states are Delaware, Minnesota, Nebraska, Oklahoma, Rhode Island, and Tennessee. *See* Collins, *Bills & Declarations of Rights Digest*, *supra* note 52, at 2491.

In light of this state of affairs, how, if at all, would one go about advancing an equality argument under the Mississippi Constitution? Is the equality principle, particularly as applied to race discrimination, so basic as to be implicit in art. III, § 5 of the Mississippi Constitution (powers vested in and derived from people)? *See* H. JAFFA, HOW TO THINK ABOUT THE AMERICAN REVOLUTION 37 (1978). Also, is equality a right retained under art. III, § 32 (rights retained)? Any rights protected under those two separate constitutional provisions may well be, upon reflection, exactly the same right, which is to say that in theory there may be little or no difference between the two guarantees at least so far as equality is concerned. If this right of equality of treatment is indeed one "inherent" in the people (that is, a natural right), then it must be one that may *never* be abolished by the state. Otherwise, §§ 5 and 32 would be rendered meaningless, and with them the very premise upon which American government is based. A more modern but less satisfactory approach for discerning a right to equal treatment under the Mississippi Constitution might suggest that such a right is implicit in the due process guarantee of art. III, § 14 of the state constitution. Equality is not easily cabined—not even in Mississippi. Perhaps the best evidence of this is the Mississippi Constitution itself with its "rights retained" guarantee.

[144] There are a number of things that can and should be done to help alleviate this problem. One idea is the creation of something that might be labeled the *State Law Reporter*. Such a reporter could be a loose-leaf service with weekly or biweekly inserts. Included in this service might be summaries or publications of significant new decisions concerning state constitutional and administrative law, as well as torts, contract, property and employment law. The value of this type of service would be that it would collect state decisions in a readily accessible volume, complete with appropriate indexes. If one of the major legal publishing houses elected to provide such a service or something comparable, then "inter-state communication" would increase substantially. Finally, some similar type of organization may be useful if adopted by computer research services, if only because of: (1) the vast number of state law decisions that do not expressly cite to a particular state constitutional provision; and (2) the vast number of state decisions that

III. Remembering the Forgotten State Courts

> The greater part of the work of the world is anonymous work; the greatest displays of intellect, force of character, and power and divination are shown, for the most part, in connection with [local] interests and are known to few beyond those immediately concerned.
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> —Oliver Wendell Holmes
> Associate Justice,
> Massachusetts Supreme Judicial Court[145]

It is disquieting that much of the work of some of the most thoughtful of our state judges has been undeservedly ignored. "So long as that condition exists," historian Leonard Levy has said, "there can be no history of American law, and without it, no adequate history of this nation's civilization."[146] Regretably, the situation has improved little since 1957 when Professor Levy published his impressive and insightful biography of Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts.

In an era when scholars and authors can write biographies of a living federal circuit judge, why is it that the biographers have not discovered such nineteenth century state court giants as Michigan's Thomas Cooley?[147] National publishing houses have seen fit to print authoritative biographies of little known twentieth century federal Supreme Court Justices such as Pierce Butler,[148] yet have largely overlooked the important and lasting contributions made to American law by state jurists of the cali-

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might refer to a state law guarantee without actually basing a holding on it.

[145] The Occasional Speeches of Justice Oliver Wendell Holmes 59-60 (Mark DeWolfe Howe ed. 1962).

[146] L. Levy, The Law of the Commonwealth and Chief Justice Shaw 3-4 (1957).

[147] *See* R. Kennedy, Jr., Judge Frank M. Johnson, Jr.: A Biography (1980); T. Yarbrough, Judge Frank Johnson and Human Rights in Alabama (1981); *see also* J. Bass, Unlikely Heroes (1981)(study of the work of several Fifth Circuit judges during the civil rights era). *But see* G. White, The American Judicial Tradition 115-22, 424-25 (brief essay on Cooley and bibliographical entry listing articles and other works treating Cooley's career).

[148] *See* D. Danelski, A Supreme Court Justice is Appointed (1964).

ber of California's Roger Traynor.[149] There are scholarly and voluminous biographical studies of the present and past members of our national Supreme Court,[150] but little ink has been devoted to the outstanding members of the state judiciary, like Pennsylvania's Chief Justice John B. Gibson[151] and judges of similar stature who have followed him in the 165 years since his tenure commenced on that state's high court.

Students of American law need to be made more aware of the role that state judges have played over the years in preserving various rights. Unfortunately, there is a tendency in far too many circles to portray state judges as mediocre, or simply subservient to majoritarian pressures, or unconcerned about civil liberties, and in some instances even hostile to them. This attitude is neither an entirely fair depiction of the past nor a salutary introduction to the present and future.

Much of our knowledge about constitutional law is grounded on the notion that it sprang forth from the mind of the federal judiciary unaided by state influence. When we think of the exclusionary rule, for example, we turn the clock back to 1914 when *Weeks v. United States*[152] was decided. In truth, the Iowa Supreme Court had rendered a ruling to the same effect a decade earlier in *State v. Sheridan.*[153] Columnist Anthony Lewis imprinted *Gideon v. Wainright*[154] in the public mind.[155] Few, however, realize that more than a century before, the Wisconsin Supreme Court had held that the state's own bill of rights mandated the public-funded appointment of counsel for indigent defendants.[156] Similarly, the holding in *New York Times Co. v. Sullivan*[157] was presaged decades earlier by enlightened inter-

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[149] *But see* G. WHITE, *supra* note 147, at 292-316.

[150] *E.g.,* MR. JUSTICE (A. Dunham & P. Kurland 2d ed. 1964); THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969 (L. Friedman & F. Israel eds. 1969).

[151] For two works on Justice Gibson, see *supra* note 17. For a recent biography of a state judge, see J. TYVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN (1984)(story of first woman to be elected as state supreme court judge, circa 1928).

[152] 232 U.S. 383 (1914).

[153] 121 Iowa 164, 96 N.W. 730 (1903).

[154] 372 U.S. 335 (1963).

[155] A. LEWIS, GIDEON'S TRUMPET (1964).

[156] *See* Carpenter v. Dane County, 9 Wis. 274, 278 (1859).

[157] 376 U.S. 254 (1964).

pretations of state free speech guarantees, most notably by decisions of the Kansas[158] and Illinois[159] courts.[160]

My point is not to discredit the many significant actions taken by the federal judiciary, particularly those of the United States Supreme Court. Rather, the point is that state judges have been ignored, not necessarily because they have abdicated their constitutional responsibilities, but more from the fact that they have been pushed out of the limelight by a post-incorporation generation of federal court watchers. To be sure, the Warren Court's activism may have prompted many state judges to become passive in the face of the commanding (and often uplifting) presence of that Supreme Court.[161] But at midpoint in the 1980's, as we recognize the Burger Court's disinclination to accept a leadership role in protecting civil liberties,[162] state court passivity appears to be yielding to an ever greater assumption of responsibility in individual rights matters.[163] This new division of responsibility, premised as it must be on federal minimums applied to the states,[164] encourages more immediate control over

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[158] *See* Coleman v. MacLennan, 78 Kan. 711, 98 P. 281, 287 (1918).

[159] *See* City of Chicago v. Tribune Co., 307 Ill. 595, 139 N.E. 86, 90 (1923).

[160] These and other cases are discussed in Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to* Gitlow, in THE FIRST AMENDMENT RECONSIDERED 14-59 (B. Chamberlin & C. Brown eds. 1982).

[161] Recently retired Justice Charles Douglas of the New Hampshire Supreme Court has noted that "federal court domination" in constitutional law has "generated a loss of confidence" in state judges. Douglas, *State Judicial Activism—The New Role For State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1147 (1978).

[162] According to California Supreme Court Justice Stanley Mosk, the existing "Supreme Court has abandoned the role of the nation's conscience." Barbash, *State Courts Expanding Individual Rights*, Wash. Post, April 2, 1984, at Al, col. 1. Quite apart from this matter, there are, as I have emphasized, principled and pragmatic reasons for turning to state law in the civil liberties area.

[163] *See, e.g.*, Stringer v. State, No. 54,805, slip. op. at 20 (Miss. Feb. 27, 1985)(holding that state search and seizure exclusionary rule has no "good faith" exception such as that created by the Supreme Court for the federal rule).

[164] As the Oregon Supreme Court's Justice Hans Linde, a leading proponent of reliance on state constitutions, has observed: "The current revival of state constitutional law can be no excuse to weaken those national standards that protect us in every state." Linde, *supra* note 6, at 200 (footnote omitted). Justice William Brennan has similarly observed:

> [E]ven the premise that state courts can be trusted to safeguard individual rights, cannot justify either the Court or Congress in limiting the role of the federal judiciary, for to do so overlooks that one of the strengths of our federal

those state government exercises of power which more directly touch citizens in their daily lives. Further, as Professor Anastaplo observed more than a decade ago: "[I]t is a serious mistake to ignore the role that states can play in protecting American freedom. The Supreme Court of the United States, with the best will in the world, cannot police everything that is done."[165]

Given a more significant role for state courts in the individual rights area, it is important to focus greater attention on state judges and their work in order to improve the American system of justice. Specifically, this more significant role for state courts is producing a richer base of interpretive constitutionalism, the benefits of which, in turn, depend on an adequate system of information dissemination. Additionally, scholarly commentary directed to state judges or to their work serves important analytical objectives. Generally speaking, academic critiques of the kind found in law reviews and social science journals can help to ensure a more rational development of decisional law. The more state judges' work product is studied and evaluated, the more accountable they are likely to become for the actions they take. Equally valuable would be the contributions the academic community can make by producing the kind of scholarship capable of influencing the normative direction of state constitutional law. For example, commentators may have something critical, yet convincing, to say about the doctrine of substantive economic due process, which persists in upwards to half of the states. Then again, other commentators might find it preferable to suggest to state court judges *new* theories of equality of treatment, freedom of expression, or other fundamental principles. Such theories, if adopted in even one state, could prove to be models of constitutional interpretation deserving of Supreme

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judicial system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

W. Brennan, Remarks at the New York University School of Law (April 15, 1982)(transcript available from the Office of Public Information, U.S. Supreme Court).

One way to preserve, or even to further, respect for state law in light of incorporation would be to adopt a " state-law first" approach to decision-making. This approach could be employed by both state and federal courts. *See* State v. Coe, 101 Wash. 2d 364, 679 P.2d 353, 359 (1984)(setting forth reasons for this approach).

[165] ANASTAPLO, *supra* note 1, at 650 n.89.

Court attention. In short, the "states are not likely to do better until better is generally expected of them."[166] And better will not be expected of them if we continue to ignore what they do and how they do it.

IV. Closing Thoughts

> No, my friend, the way to have good and safe government, is not to trust it all to one, but to divide it among the many . . . . What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and contracting [of] all cares and powers into one body . . . .
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> —Thomas Jefferson (1816)[167]

There is nothing fundamentally novel about reliance on state constitutions. It seems so because for nearly the past three decades our system of constitutional government has malfunctioned. If the machinery of state government failed us, it was largely because we were too involved with other legal mechanisms such as federal judicial review. Despite our theory of government, Americans too often lose sight of the practical importance of our *system* of government. And our system of government is one that places many and diffuse limitations on power. The last set of those limitations is embodied in the federal Constitution. The final body of government called upon to apply the last set of limitations is the United States Supreme Court. Nevertheless, in the world of law, not only did the last become first, but the last also became the only limitation. Almost mysteriously, checks on government power affecting individual rights came to be seen as limitations imposed exclusively by the federal Bill of Rights as interpreted by nine federal justices.

Talk of state constitutional law is intended to remind us of something basic: Government must itself obey the law—*all* the laws. We make a serious mistake when we allow government to

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[166] *Id.*

[167] Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816) in 4 The Writings of Thomas Jefferson 421 (A. Lipscomb ed. 1904)(Monticello ed.).

do as it pleases, provided only that it stay within the bounds of the federal Constitution. If Benjamin Gitlow, Dollree Mapp, Clarence Earl Gideon, Ernesto Miranda, Linda Brown and Sally Reed were no more than names associated with liberal and enlightened *dissenting* opinions, would we allow the states complete rein where individual rights are at stake? Of course not. State constitutions protect our right to speak. State statutes guarantee remedies for evidence gathered in violation of the law. Local court rules specify when counsel is to be appointed. Police regulations dictate how confessions are to be obtained in accordance with the law. And city charters and administrative rules set out what types of discrimination government must avoid. Each of these limitations on the state government's power carries the force of law. Yet simple truths escape us. We think in federal terms. We think of federal judges and of federal rulings. Consequently, we do not always demand that state officials themselves comply with state law. We do not always demand that the city council member obey the city charter, even without the threat of a lawsuit. We do not always demand that the police chief obey the police manual, quite apart from any concern with excluding evidence. And we do not always demand that our state legislators honor the state constitution *before* passing a law. If it requires some adjustment for a generation of Earl Warren and Hugo Black disciples to adapt to the idea of a Shirley Abrahamson or a Hans Linde invoking state law to stay government's hand, how much longer will it take before the same and more is expected of a state attorney general[168] or a school administrator? Thinking about state constitutional law teaches us to think about all of the other reasons why government may not always act arbitrarily. In one respect, it redirects our attention to the rules of government. If the federal Constitution teaches us to take rights seriously, then thinking about state constitutions

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[168] *See, e.g., Jersey Attorney General Sets Strip Search Rules*, N.Y. Times, Aug. 21, 1984, at 15, col. 3; Collins, *Guru, Guns, Rules & Remedies: New Developments in State Law*, Nat'l L.J., Oct. 31, 1983, at 27, col. 1; *cf. id.* at 28, col. 3, notes 1 & 4. *But see* Collins, *A.G.'s Office Should Have Avoided Potential for Conflict*, Statesman Journal (Or.), April 15, 1984, at E1, col. 1 (noting attorney general's office's involvement in drafting proposed initiative that would, among other things, abolish most, if not all, state statutory laws governing police searches).

ought to encourage us to take rules seriously.[169] Rules make rights possible. Moreover, the rules of state law protect us in ways that the assertion of rights cannot. That is, not every one of our expectations of how government should act needs to rise to the level of a full blown right before it is incumbent on the state to act in a given way. Government, whether it be local, state or federal, must proceed according to how it has been constituted. How its power has been limited in a local charter or a state constitution does not necessarily depend upon the existence of a natural right in order to warrant compliance. Something need not be tagged a "fundamental right" protected under the supreme law of the land before we can honestly expect the state to treat people in a way consistent with those social values that have been translated into local law. By the same token, simply because the United States Supreme Court has decided that some claim of right is not secured under the federal Bill of Rights does not mean, of course, that the same claim must fail under every other law in the land. That is the splendor of federalism.[170]

There is a role, an important one, to be played by the states in securing freedom. During the course of this decade we are likely to see more responsibility placed on the shoulders of state officials, including state judges. I trust that we will witness in Mississippi and elsewhere the assumption of that responsibility in ways never before thought possible.[171] If so, our nation would

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[169] *See, e.g.*, Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 390-91 (1980)(examples). Given the comparative ease with which state constitutions can be amended, it seems preferable to think of states' bills of rights as limitations on government rather than as "fundamental rights." *See* Collins, *Government By Popular Initiative: States Amend Their Constitutions*, Nat'l L.J., June 18, 1984, at 14, col. 1. Of course, my emphasis relates to the source of the right protected rather than to the nature of any given right.

[170] *See supra* note 43; *see also* ANASTAPLO, *supra* note 1, at 713 n.83 (suggesting that state officers be instructed on the meaning, purposes, and value of constitutional rights). The statement made in the text is not to be understood as an argument advocating differences in judicial interpretations simply for the sake of being different. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 934 (1976).

[171] For a generation captured by the uplifting constitutional drama of the Warren Court, it is understandably difficult to adapt to the notion of entrusting the protection of civil rights to state judges. Though not without historical justification, it may be even

be the better for it. For a nation and its states can be said to respect freedom only if in the first instance the rule of law is respected. And the constitutions and laws of the states, we must never forget, though not supreme, are prior to all national laws.

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more difficult where state judges from a particular region are called upon to decide certain issues involving equality of treatment. *But cf.* Dupree v. Alma School Dist., 651 S.W.2d 90 (Ark. 1983). Furthermore, state judges and state law are typically more vulnerable to majoritarian pressures and prejudices. *See Developments, supra* note 107, at 1347-56; Wasson, *Federalism and The Exclusionary Rule*, 44 OR. ST. B. BULL. 8 (No. 7, 1984). Still, can we as a federalist nation afford to bypass them? That is, does the eradication of social injustice depend *simply* upon the chance of the fortitude and foresight of distinguished federal judges of the high caliber of Elbert P. Tuttle, John Minor Wisdom, John R. Brown, Richard Taylor Rives and Frank M. Johnson, Jr.? Is this always the case, even in some of the worst of times?

Life could not have been pleasant for anyone in Mississippi in the summer of 1962. It certainly had not been pleasant for James Meredith, a black seeking admission to the University of Mississippi. Undoubtedly, the courage of some judges in the Fifth Circuit helped in many important ways to bring about a break from the cruel injustice of the past. But one wonders what may have happened if the initial controversy had been presented to state judges with equally sound convictions about right and wrong. Would it have been possible for any state judge or court to stand up to the likes of Mississippi Governor Ross Barnett or Lieutenant Governor Paul Johnson, Jr.? *See* Bass, *supra* note 147 at 182-200. Would it have been possible for any state law employed in defense of racial equality to survive attacks almost certain to come from the state legislature? Perhaps in 1962 the initial vindication of basic rights had to come from the federal government and its courts. Nevertheless, if Mississippi judges had made it plain that segregation was wrong under the law, would it not at least have had the useful effect of demonstrating *state* officials' commitment to fairness? Having come from fellow Mississippians, could such a decree have helped to awaken that sense of fairness so long dormant in the minds and hearts of so many? And if state law had been invoked in this imaginary crusade, sooner or later truly decent people would have stood up to defend the principles behind it.

My general point is that, if nothing else, such an "internal" attack on the racism of the day could have well had salutary social consequences. It could have served as a striking sign that the people of Mississippi were by no means of one mind in their purported opposition to racial justice. Moreover, such a position, if taken, could have led to more unified efforts between the state and federal governments in combating racism. For ultimately, it is this sense of justice, revered also at the local level, that truly makes possible the actualization of those commands found in the fourteenth amendment to the United States Constitution.

Finally, something of the spirit of these closing remarks can be seen in a 1962 letter that then Fifth Circuit Judge Ben Cameron (one of the more ardent champions of "states' rights") addressed to his son upon learning of the latter's involvement as a plaintiff in a civil rights suit to desegregate Tennessee public schools. Said the staunch old-world Southerner to his son: "The fact is that we live in different worlds and maybe it takes folks like you and folks like me to keep fighting for the truth, that it may, in God's good time, be found." Bass, *supra* note 147, at 233.

THE FIDUCIARY OBLIGATIONS OF LENDERS IN LEVERAGED BUYOUTS

*Leo Clarke**

I. Introduction

The application of Newton's law of inertia to corporate finance is perhaps best demonstrated by the inevitable demands for prohibition and regulation that follow every new Wall Street fad. The recent popularity of leveraged buyouts (hereinafter "LBOs") as a means of acquiring control of large corporations[1] has generated extensive debate over their social and economic implications.[2] This debate has taken place within the context of the generally accepted view of the relationship among the corporation, its management, shareholders, and creditors.[3] This article

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The author is grateful to David O'Donnell of the University of Mississippi School of Law for his assistance in the preparation of this article.

[1] *See* Benjamin, *Leveraged Acquisitions*, 393 Prac. Law Inst. 9, 11 (1982). An LBO is made possible when the buyer's equity risk is minimal as compared to the purchase price. The majority of the purchase price is raised through outside lenders or sellers under the guise of a deferred purchase price. The assets of the desired business act as collateral. Frequently, the acquired company itself is the borrower so that the purchaser has no liability in case of default unless the lender or seller has obtained a personal guaranty. *Id.*; *see* Fradkin v. Ernst, 571 F. Supp. 829, 833 n.2 (N.D. Ohio 1983)(management's purchase of company through acquiring outstanding stock); Sloan, *Luring Banks Overboard?*, Forbes, Apr. 9, 1984, at 39 (acquisitions of public companies through large debt-financing deals).

[2] *See, e.g.*, Thomas, *A Free Ride For Management Insiders*, N.Y. Times, Jan. 22, 1984, § 3, at 2, col. 2-4 (LBOs often place company deeply in debt and benefit management at expense of stockholders); DeAngelo & DeAngelo, *The Numbers Show Everyone Profits*, N.Y. Times, Jan. 22, 1984, § 3, at 2, col. 2-4 (LBOs benefit both stockholders and management and may result in higher productivity).

[3] *See* McCone & Van Kirk, *Leveraged Buyouts by Management*, 16 Rev. Sec. Reg. 769, 770-73 (1983)(analysis of legal implications of LBOs); Stoney & Zonana, *Tax Considerations in Leveraged Acquisitions*, 393 Prac. Law Inst. 41, 45-80 (1982)(legal, economic, tax, and accounting considerations involved in structuring LBOs); Stoney, *The*

challenges that accepted view and argues that the basic legal principle of corporate governance — the fiduciary obligation of management to shareholders — is but one manifestation of a broader fiduciary principle that should regulate all economic relationships with the corporation. The argument is developed through an examination of the relationships among the lender or group of lenders (banks, insurance companies, and others)(hereinafter "leverage creditor") which finances an LBO and other contributors to the economic enterprise represented by the corporation. The ultimate issue is whether the leverage creditor who makes possible an LBO is responsible in some manner to other participants (shareholders, employees, suppliers, creditors, and others) in the acquired enterprise if the future does not turn out to be as rosy as predicted.[4] The question is not whether LBOs are good or bad. It is whether LBOs justify imposing a fiduciary obligation on the leverage creditors to protect interests of persons who are adversely affected by the increase in leverage.

The essence of an LBO is that the acquisition of a business is financed or leveraged by loans which will be paid out of the future earnings of the company. The assets of the company are hypothecated to the leverage creditor as security for the loans. In some cases, financing (often referred to as "mezzanine financing") is obtained through the issuance of preferred shares or subordinated debt to the investment bankers, venture capitalists, pension funds, and other institutions included in the lever-

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Impact of Tax & Accounting Considerations, 305 PRAC. LAW INST. 35, 76-84 (1979)(same); *see also* Draughon, *Financing the Leveraged Buyout*, 64 J. COM. BANK LENDING, May 1982, at 23 (structuring and negotiating financial support of LBOs).

[4] I do not attempt here to analyze all potential liabilities of leverage creditors if the deal goes sour. In particular, I am not concerned with liabilities of financing creditors under the federal securities laws. These issues, although of obvious importance to any party considering financing a leveraged buyout, present different analytical considerations. In the securities context the leverage creditor is typically concerned with liabilities to a different group of claimants, the target's existing public shareholders. Moreover, the duty imposed by the federal securities laws is a duty of disclosure as opposed to a duty to protect or compensate. Finally, it could be said that the policies of the federal securities laws are always furthered by a broadening of the duty to disclose. The same cannot be said of a duty to protect, since the latter requires the creditor not simply to engage in additional activities but also to forego what might be more profitable alternatives.

age creditor group.[5] The structure of the acquisition itself also can vary from a merger to a tender offer with a subsequent cash-out merger.[6]

The perils of an LBO are readily apparent. For present purposes, we can assume that the following is a possible outcome for a company that has been inadequately capitalized. The acquired company must service an extremely large debt at high interest rates. The burden of making interest payments prevents the company from developing new products, acquiring new equipment, or maintaining adequate inventories. As a result, sales suffer and meeting the burden of interest payments becomes more difficult. Ultimately the lenders foreclose on their security interests or the company goes into bankruptcy. Employees are then without jobs, suppliers cannot collect their trade debts, and customers have claims for breach of contract. All three groups look for compensation from the deep pocket of the leverage creditor or at least seek to subordinate the leverage creditor's claims to their own.[7] I start with the premise that the fiduciary principle may provide an acceptable solution to this problem.

II. The Fiduciary Principle

Courts have employed several common-law doctrines to analyze the potential liability of one creditor of a corporation to other creditors. Alter ego, instrumentality, agency, and negli-

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[5] *See* Meyer & McGough, *Where the Smart Money Wants to Go*, Forbes, Dec. 19, 1983, at 38 (analysis of attractiveness of LBOs to mezzanine investors).

[6] *See supra* note 3.

[7] The debate over the extent to which those supplying capital to a business enterprise have an obligation to compensate those who suffer losses from the failure of the enterprise is as old as the concept of the corporate fiction. Of more recent vintage is the debate whether groups other than those supplying capital should also participate in the corporate decision-making process. Generally, the compensation principle interferes less with corporate freedom. A right to vote would give noncapital interests the opportunity to prevent a buyout and would therefore markedly increase those parties' bargaining power. On the other hand, merely imposing a duty on those financing the buyout (leverage creditors) to protect or take into consideration the impact of their decisions on such noncapital interests would be much less intrusive. At most, a disgruntled group could enjoin a threatened violation of the duty; but more likely it would be limited to a decree that the leverage creditor's claim be subordinated to the claims of the group. *See also* O'Donnell & Gissen, *Off-balance Leveraged Buyouts?*, Forbes, Oct. 11, 1982, at 250 (risks of LBOs).

gence doctrines provide the basis for many decisions.[8] However, the fiduciary principle, an equitable doctrine that encompasses all the foregoing theories, provides the most fertile ground for examination because fiduciary concepts are so flexible and have been such successful tools for dealing with corporate law issues.[9]

Most discussions of fiduciary obligations have begun with a statement to the effect that the case law is in hopeless confusion and that the precise contours of the principle have never been adequatey mapped.[10] Apparently a fiduciary, like pornography, can be readily identified, but not defined.[11] Perhaps the best place to start our inquiry, then, is to disabuse the reader of possible preconceived notions as to the limits of the fiduciary doctrine.

A. The Laundry List

Courts usually determine both the existence and the scope of a fiduciary obligation by labelling the relationship between a plaintiff and a defendant. A laundry list of relationships — trustee-beneficiary, principal-agent, attorney-client — comes complete with fiduciary baggage;[12] status, not the facts of a particular case, gives rise to the fiduciary obligation of the trustee, agent or attorney. That a principal has superior bargaining power or expertise relative to his agent or has given the agent little discretion or control is irrelevant. The agent still has a fiduciary duty, although courts in such close cases may limit the

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[8] *See generally* Lundgren, *Liability of a Creditor in a Control Relationship With the Debtor*, 67 MARQ. L. REV. 523, 525-39, 549-52 (1984)(theories of creditors' liability).

[9] *See* Kaplan, *Fiduciary Responsibility in the Management of the Corporation*, 31 BUS. LAW. 883, 898-917 (1976)(application of fiduciary principles to instances of corporate business combinations, corporations going private, and corporate sale and retention of control).

[10] *Id.* at 886; *see, e.g.*, Wolinsky & Econome, *Seduction in Wonderland: The Need For a Seller's Fiduciary Duty Toward Children*, 4 HASTINGS CONST. L.Q. 249, 265 (1977)(examination of courts' failure to articulate satisfactory fiduciary concepts).

[11] *Cf.* Roth v. United States, 354 U.S. 476, 489 (1956)(attempt to explain confines of obscenity).

[12] United States Liab. Ins. Co. v. Hailinger-Hayes, Inc., 1 Cal. 3d 586, 596, 463 P.2d 770, 776, 83 Cal. Rptr. 418, 424 (1970)(reciting laundry list); *see* J. POMEROY, EQUITY JURISPRUDENCE § 956(a) at 793 n.6 (5th ed. 1941)(state by state analysis of categories of fiduciary relationships).

scope of that duty.

The typical laundry list of fiduciaries does not, however, include all fiduciary relationships, but only those at the core of the doctrine. Like other per se rules, the characterization of certain relationships as fiduciary in nature is designed to make the concept more efficient in its application.[13] Because the factors that give rise to a fiduciary duty are present in the vast majority of these relationships, a per se approach saves the parties the trouble of expressing or negotiating their respective rights and eliminates difficult factual determinations in the event of litigation.

B. The Pepper v. Litton *Formulation*

Like most per se rules, the laundry list of fiduciaries does not establish a limit to the fiduciary principle but merely evidences the most significant factors in determining whether a fiduciary duty should be imposed. Per se rules of fiduciary relationships do not automatically exclude the relationship between the leverage creditor and other corporate creditors, but those rules also say absolutely nothing about whether that relationship *should be* fiduciary. For example, one might infer from the list that a fiduciary is one who acts primarily for the benefit of another in connection with a specific matter. But such an inference would fail to appreciate the policies underlying the fiduciary concept. Clearly, a leverage creditor does not act principally for the benefit of other creditors of the corporation, but this does not mean that the law should permit that creditor to adversely affect the interests of other creditors with impunity.

A more accurate view of the underpinnings of fiduciary obligations in the corporate context is not that the fiduciary (for example, a director) is acting principally for the benefit of shareholders, but that the fiduciary has both physical (or legal) control over the shareholders' property and discretion to use that property. A focus on control is preferable to a focus on benefit because the latter does not explain a common dispute: an

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[13] *Cf.* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348-49 (1982)(per se application of Sherman Act).

alleged breach of duty by a controlling shareholder/director to minority shareholders. It is absurd to hold that the person who has more at stake in an enterprise than anyone else is acting primarily for the benefit of others. Moreover, control is a more profitable basis for judicial inquiry. Benefit requires difficult-to-evaluate proof of intent, whereas control and discretion are more susceptible to extrinsic proof. Consideration of control is also more consistent with the parties' expectations. If one contributes resources to a corporate enterprise, his chances of receiving a good return are probably improved if his resources are pooled with resources of those who are acting for their own benefit. But he does not expect that those in control will use his resources in a manner that will not inure to the best interests of the enterprise.

The difference between the two approaches is subtle but important. It is important not so much because the concepts may lead to differing conclusions about the scope of a fiduciary duty once imposed, but because the benefit approach tends to unduly limit the imposition of the duty in the first instance. A good example is *Pepper v. Litton*.[14] Pepper had licensed a patent to a corporation controlled by Litton.[15] Litton had obtained a judgment against the corporation on the basis of fictitious wage claims and then sought to avoid payment of Pepper's claim by causing the corporation to file a bankruptcy petition.[16] Pepper responded by petitioning the bankruptcy court to subordinate Litton's judgment to his claim.[17] Justice Douglas, writing for a unanimous Court, held that the bankruptcy court had properly subordinated Litton's claim because he had violated his fiduciary duty to Pepper.[18] Justice Douglas based his holding on Litton's control. To claim that Litton was acting primarily for Pepper's benefit in the usual sense would have been nonsensical because Litton and Pepper had dealt at arm's length. However, Pepper had contributed his property (the patent) to the enterprise and would have benefited from its success. Because Litton

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[14] 308 U.S. 295 (1939).
[15] *Id.* at 297.
[16] *Id.* at 297-98.
[17] *Id.* at 301.
[18] *Id.* at 311.

controlled the enterprise, he owed a fiduciary duty to "the entire community of interests in the corporation — creditors as well as stockholders" to operate the corporation to the extent possible for their benefit.[19]

Pepper v. Litton is significant for its recognition of the control principle and for its extension of an insider's (Litton's) fiduciary duties to a creditor (Pepper).[20] However, its more important contribution to fiduciary doctrine in the corporate finance realm is its recognition that the duty, once imposed, runs to all with an "interest" in the enterprise. Justice Douglas was not required to define "interest," but his reliance on control of "common property" in a sole shareholder context undeniably implies that one with control over a corporation owes a duty to act for the benefit not only of those who invested equity capital, but for all who contributed resources of any kind.[21]

C. *Other Justifications for Using the Fiduciary Principle*

Justice Douglas' amalgamation of the benefit and control concepts is, however, not the only basis for imposition of a fiduciary obligation on a leverage creditor in favor of noncapital interests. Recent commentators have described several other bases upon which courts have imposed fiduciary obligations. In a 1981

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[19] *Id.* at 307.

[20] *See id.* at 306-07.

[21] *See id.* The "community of interests" concept has not been fully developed. In fact, cases construing the term are relatively few. *See, e.g.*, Hanraty v. Ostetag, 470 F.2d 1096, 1099 (10th Cir. 1972)(controlling stockholder has fiduciary duty to protect "entire community of interests"); Kaminsky v. Kahn, 23 A.D.2d 231, 259 N.Y.S.2d 716, 725 (1965)(duty of good faith extended to minority stockholders).

The *Pepper* case did not discuss whether the fiduciary had the same duty to all interests or what the fiduciary's obligation was when those interests conflicted. But these issues are separate. *Pepper* and its progeny provide sound footing for a conclusion that a leverage creditor owes a fiduciary obligation to other creditors. In this regard, *Pepper* represents substantial development in the common law, which originally recognized only that directors of the corporation had a fiduciary obligation to the *corporation*. Only later was grudging recognition given that this obligation also extended to shareholders. *Pepper* extended that duty to run in favor of creditors, but its *holding* was otherwise unremarkable. The facts in the case involved a sole shareholder who was clearly using the corporation as a means to defraud creditors. *Pepper*'s significance, which is generally unappreciated, is that it imposes a fiduciary duty on any person with "control" over corporate assets, and does so in favor of all interests in the enterprise. *See id.* at 307.

article, British lawyer J.C. Shepherd identified seven different theories upon which fiduciary obligations are based.[22] Three of those, plus Shepherd's own theory, will be discussed briefly.

The first is the "commercial utility" theory, which holds that a court will impose a fiduciary duty whenever holding a person to a higher than average standard of ethics or good faith is necessary to protect the integrity of a commercial enterprise.[23] This approach, reflected by the leading case of *Meinhard v. Salmon*,[24] is based on the presumption that a certain amount of trust and confidence is necessary to promote economic efficiency. The theory is therefore consistent with the developing law of relational contracts, which are now so common in modern commerce. Both the commercial utility theory and theories of relational contracts recognize that traditional contract law is inadequate to deal with complex, long-term relationships. Meeting of the minds, objective assent, and intent are not as helpful as more indefinite concepts such as legitimate expectations, good faith, and fair dealing in allocating the risks of doing business in a changing economy. There has been a gradual recognition that concepts of equity and tort law may be more suitable for allocating risks than more specific contract doctrines.

Shepherd also identifies the "unequal relationship" theory, which holds that a fiduciary relationship exists whenever one party has substantially greater bargaining power than the other party,[25] and the "power and discretion" theory, which holds that a fiduciary relationship exists where one person has both the power to change the legal position of another and discretion in the exercise of that power.[26] Each of these last two theories combines efficiency and equity ideals. The theories further efficiency because they tend to fulfill unexpressed expectations. For example, except in the most unusual circumstances, neither party entering into an unequal relationship could expect the more powerful party to have unfettered discretion, or the relationship

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[22] Shepherd, *Towards A Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51, 53-71 (1981).

[23] *Id.* at 56-57.

[24] 249 N.Y. 458, 164 N.E. 545, 546 (1928)(high honor is standard for behavior).

[25] Shepherd, *supra* note 22, at 61.

[26] *Id.* at 68.

would be too one-sided. In the absence of bargaining on that specific issue, then, one can infer that the parties intended to impose some limits on the more powerful party. These two theories also promote equity interests because common notions of fairness do not permit the more powerful to bully the weak. But each of the preceding theories is of limited utility in the present context because the leverage creditor will seldom have occasion to bargain face-to-face with the other interests. Nevertheless, the theories are useful to the extent that they isolate factors which strongly influence decisions on all fiduciary issues.

Finally, Shepherd offers his own theory which posits that a fiduciary relationship exists whenever an individual receives and utilizes any form of power conditioned upon a duty to utilize that power in the best interest of another.[27] As applied to LBOs, the theory would hold that a leverage creditor, by financing a buyout that would not be economically feasible if made on the usual terms (a normal amount of equity), receives the powers granted to it in the loan agreement on the condition that it utilize those powers in the best interest of the corporation. When a leverage creditor exercises the powers under the loan agreement by either enforcing an affirmative covenant or refusing to waive a negative convenant, it assumes a fiduciary obligation to the corporation. Similarly, under *Pepper v. Litton*, such an obligation would extend to the corporation's "community of interests."

D. The Fiduciary Principle and Contract Rights in the Corporate Finance Context

The search for a cohesive theory of fiduciary relationships is particularily relevant to corporate law, given that nonstatutory corporate law is nothing more than specific application of the general fiduciary principle. Unfortunately, much confusion has resulted from a failure by courts and lawyers to appreciate this fact. The universal recognition of certain relationships as fiduciary in nature frequently leads to the conclusion that relation-

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[27] *Id.* at 75. Shepherd qualifies his meaning of power to be both a legal *and* a practical power over the beneficiaries and property. Receipt of power is defined to mean not merely the dominant role acquired by the fiduciary, but the repose of trust or confidence that transfers the power. *Id.*

ships not so universally recognized must be nonfiduciary. This has been particularly true with respect to the relationships of creditors *inter se*.[28] Because creditors are assumed to deal at arm's length, denominating their relationships as fiduciary seems contradictory. However, this view demonstrates a fundamental misconception of both fiduciary law and the economic relationships among those involved in the corporate enterprise. *Pepper v. Litton*, in holding that a corporate insider could be a fiduciary to creditors of the corporation, recognized that both corporate insiders and creditors have a common interest — the long-term success of the corporation. Thus, even though the interests of management and creditors are sometimes diametrically opposed, their long-range common interests may require fiduciary duties between them. Once one understands this relationship, the possibility of the existence of fiduciary obligations among creditors themselves should be no surprise. In the short run, one creditor's gain may be another's loss, but over the long run all creditors desire a profitable corporation. This mutual interest, when combined with an unequal relationship or one of the other "plus" factors identified by Shepherd, may give rise to a fiduciary relationship.

The failure to recognize that groups with conflicting short-term interests may have common long-term interests is perhaps the greatest intuitive obstacle to a deeper understanding of the fiduciary principle. Thus, Justice Douglas' "community of interests" is the key to understanding fiduciary relationships in the corporate context. Like archrivals stuck in an elevator, shareholders, creditors, and employees share a fundamental mutual interest which in particular circumstances at least overwhelms their usual animosities. The fiduciary principle is the means by which courts seek to ensure that the parties mutual, more fundamental interest is furthered. This is not to say that a creditor-fiduciary owes the same duty to all other groups whose interests are affected by the corporation's success or failure or that the fiduciary must place others' interests on the same level as its own. The "community of interests" concept simply reflects the

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[28] *See generally* Lundgren, *supra* note 8, at 534-39 (demonstrating that law of agency, applied to creditors, may or may not result in finding of liability).

canon that it is not in the public interest, whether defined in terms of economic efficiency or broader concepts of social welfare, to permit all persons to exercise their "legal" rights regardless of the harm that may be done to others. This principle is universally recognized in other contexts, such as land use,[29] but it has not been applied generally in the corporate realm.[30] Combining Shepherd's formulization with Justice Douglas' approach in *Pepper v. Litton* provides the following statement of the fiduciary principle that applies to a person dealing with a corporation: *A fiduciary relationship exists whenever a person deals with a corporation such that he obtains the power to control or influence the corporation to the extent that he can unilaterally and detrimentally affect the legal or economic rights of other interests in the corporation* and *he uses that power.*

The conflict between the fiduciary principle and the contractual rights of those dealing with a corporation is the most pervasive theme of modern corporation law. Recognition of the supremacy of contractual expectations over fiduciary obligations has been most pronounced in the area of close corporations, but the tension between the concepts is also evident in disputes regarding publicly held corporations.[31] Viewed in the proper perspective, however, there is no conflict between fiduciary obligations and contractual rights. The fiduciary principle is simply a means of assuring that one party to a contract does not reap more benefit from the exercise of granted rights or powers than it could have legitimately expected to obtain at the outset. Regardless of whether the parties were of equal bargaining power to begin with, the "community of interests" in a corporation may have been unable or unwilling to express appropriate limits

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[29] *See generally* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation Law,"* 80 HARV. L. REV. 1165, 1214-24 (1967)("community of interests" theory in area of eminent domain).

[30] Other legal doctrines which restrict the freedom of parties to enforce their contracts because of resulting detriment to third parties include prohibitions on restraint of trade (*e.g.*, price-fixing), interference with prospective advantage, and fraudulent conveyances. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 59, 63-64 (1964)(discussion of effect of government's police power, in enterprise capacity, on private parties).

[31] *See* Honigman v. Green Giant Co., 208 F. Supp. 754, 758 (D. Minn. 1961)(in derivative action by shareholders against recapitalization plan, directors proposing plan bore burden of establishing plan's fairness to nonassenting shareholders).

upon the contractual rights granted to one group of interests. The parties may have been unable to make such limitations because they did not deal directly with each other, could not foresee the precise situations in which the power might be exercised, or did not appreciate that such a power might exist. Likewise, the parties may have been unwilling to expressly limit the putative fiduciary's rights because the fiduciary was in a more powerful bargaining position and would not agree to a limit or because the cost of negotiating such limits might have exceeded the benefits of reaching an agreement.

Appreciation of the complementary nature of contract and fiduciary principles is of fundamental importance. All too often a court summarily denies that a creditor is a fiduciary because of arm's length negotiation or because the imposition of the duty would, in the court's view, drastically and unfairly alter the quid pro quo.[32] However, it is neither the bargaining positions of the parties before the relationship is commenced nor the expressed quid pro quo that gives rise to a fiduciary obligation. A basic assumption underlying the fiduciary principle is that a party with any choice would not enter into a relationship in which it becomes subject to the control of another unless it believed there were some inherent limits on that control. The fiduciary principle in this context merely supplants the court's interpretation of the contract; the court's task is to determine not merely the parties' bargaining power, but also whether their legitimate expectations require the imposition of fiduciary limits on the rights of one party.[33]

An alleged fiduciary will often argue that the imposition of a fiduciary duty is unfair, claiming that it would not have entered into the transaction if such a duty had been explicitly included in the agreement. Such a claim should be given little credence.

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[32] *See, e.g.*, Cosoff v. Rodman, 699 F.2d 599, 612 (2d Cir.)("indenture trustee has [no] duty, fiduciary or otherwise, to seek for the holders of debentures any benefits that are greater than those contractually due them"), *cert. denied*, 104 S. Ct. 89 (1983).

[33] *E.g.*, Weinberger v. Kendrick, 698 F.2d 61, 78 (2d Cir. 1982)(bank owed no fiduciary duty to borrower's security holders). One can question whether the use of "fiduciary" in this situation does more harm than good. Its use seems so firmly established that there is little hope that courts will cease using "fiduciary" terminology in favor of more accurate contractual interpretation language.

First of all, it is subject to the usual problems of self-serving testimony. Certainly, a creditor will claim that it would not have entered into the transaction except on the condition that it receive "full" protection for repayment of its claim. Such testimony is extremely difficult for other interests to rebut and is easily manufactured. More importantly, the claim completely misconstrues the fiduciary principle. We do not listen to the landowner in an inverse condemnation action who claims that he would not have bought the land if he had known that it would be zoned to prohibit the operation of a quarry. His expectations, whether legitimate, reasonable, or otherwise, are simply subordinate to the overriding public interest in the use of his property. The rights of a landowner, no matter how perfected in contract, are subject to the rights of adjoining landowners and the public insofar as the landowner's activities have external effects. The same result follows, or should follow, in the present context. Neither the management nor the shareholders of a corporation can transfer greater rights to the corporation's assets or business than they themselves have. Under *Pepper v. Litton*, the management's and shareholders' interests in the corporation are subject to (or perhaps coequal with) the rights of other interests in the "community."[34] No person entering into a relationship with a corporation can legitimately expect to receive from management or the shareholders greater rights than those persons had or controlled.

E. Leverage Creditors as Fiduciaries

This restatement of the fiduciary principle requires a reassessment of the relative significance of the variables in the liability equation. The genius of the principle is that it permits equitable control of transactions where the parties cannot efficiently allocate risks. Its equitable nature, however, is also its greatest weakness. The flexibility which is necessary to achieve justice in diverse cases has led to a complex and conflicting body of law in which characterization tends to replace rationalization. The determination that one is a fiduciary carries with it the baggage of

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[34] *Pepper*, 308 U.S. at 306.

fiduciary doctrine; consequently, courts have placed undue emphasis on the question of duty vel non. The approach heretofore advanced treats that variable as relatively insignificant. Any combination of control by the alleged fiduciary and reliance by the alleged beneficiary should give rise to a fiduciary duty. Likewise, other variables — the identity of the beneficiary and the scope of the duty — become more significant in the equation. All fiduciaries need not owe the same obligations to all potential claimants, and a single fiduciary need not have the same duty to all classes of beneficiaries.[35] For example, corporate directors have a lesser obligation to shareholders than attorneys have to clients; and a director has a lesser obligation to a sophisticated shareholder than he has to the little old widow from Dubuque.

Viewed in this light, leverage creditors should be classified as fiduciaries at least to some interests in the corporation. To understand why, let us begin with an examination of the usual contractual arrangement between the leverage creditor and the debtor corporation.[36] In an LBO the leverage creditor takes as security for the repayment of its loan not merely the borrower's promise but also a security interest in assets of the borrower. A lender will participate in an LBO only to the extent that it is confident that its collateral can be sold at any time for an amount at least equal to the debt plus costs of collection. The loan and the granting of a security interest in all or part of the debtor's assets do not in themselves transfer present *control* to the leverage creditor. Without more, the leverage creditor has no right to elect directors, approve or disapprove any corporate action, or otherwise participate in the corporation's day-to-day or long-term activities.

The granting of a security interest in the corporation's assets, however, does constitute a significant transfer of an *interest* in the enterprise to the leverage creditor. From a common shareholder's viewpoint, the transfer of a security interest is similar to a liquidation preference in favor of the leverage creditor. From the viewpoint of existing unsecured or subordinated creditors of the debtor, a transfer of a security interest in assets

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[35] *See supra* note 15 and accompanying text.

[36] *See supra* note 4 and accompanying text.

deprives those creditors of a pool from which they may recover their claims. In the usual financing transaction, the granting of the security interest does not have a materially adverse effect on the interests of unsecured creditors, because the debtor is receiving consideration from the secured creditor in the amount relatively equal to the security interest transferred.[37] In an LBO, on the other hand, the assets received from the leverage creditor are being used to buy out equity interests, interests subordinate in priority to those of creditors.[38] The creditors, although no worse off than before the transaction, have in a real sense been subordinated to what formerly were the equity interests. The leverage creditor has not improved its position, but it may have seriously reduced the chances of repayment for existing creditors.

Because a corporate transfer of a security interest which enables management to buy out subordinate claims makes unsecured creditors of a corporation more dependent on the good faith of the leverage creditor, the mere granting of a security interest may be enough to establish the control necessitating a fiduciary relationship. Even so, such a duty would probably im-

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[37] A security interest in quality assets of a debtor may be the sine qua non of an LBO. A leverage creditor, however, may not be satisfied merely with a grant of a security interest. A careful leverage creditor may also require that the debtor's new shareholders (assuming that the buyout is by a small group of management or entrepreneurs) pledge their stock. This will permit the leverage creditor, in the event of default, to transfer the business as a whole simply by selling the stock rather than selling the individual assets. A stock transfer is generally a much less expensive and less complicated means of transfer. As a pledgee of the corporate stock, the leverage creditor arguably occupies the same position as a shareholder and acquires all the shareholder's usual fiduciary obligations. The case law makes it clear, though, that a pledgee who does not have the right to vote the stock prior to default does not become a shareholder and therefore does not have any fiduciary obligation to others until after default. In other words, the mere right to control in the future does not give a right to control before default. Since the leverage creditor acquires a security interest in the stock only to facilitate foreclosure, it is unlikely that taking the stock as security broadens the scope of the fiduciary obligation which it inherited by taking a security interest in the assets.

See also Rosenberg, *Fraudulent Conveyances and Preference Implications of Leveraged Acquisitions*, 305 PRAC. LAW INST. 147, 173-74 (1979). Fraudulent conveyance problems may arise if the debtor is in financial trouble at the time of the acquisition, or if the creditor oversecures itself. *Id.* at 173-74.

[38] Equity interests are subordinate to creditors either through consent, bankruptcy (11 U.S.C. § 1129 (1982)), or state corporation law regarding dissolution (*e.g.*, DEL. CODE ANN. tit. 8, § 281 (1974)).

pose no additional burdens on a secured party. Article 9 of the Uniform Commercial Code imposes upon a secured party an obligation to be commercially reasonable.[39] While that duty does not provide a cause of action in favor of unsecured creditors, the threat of litigation from the debtor or the debtor's bankruptcy trustee is probably sufficient to cause a fiduciary to act with utmost care in foreclosing on its security interest.

The more significant and difficult issue is whether the control given to a leverage creditor imposes duties prior to foreclosure. Besides taking a security interest in the debtor's assets and perhaps a pledge of its stock, a leverage creditor will also require the debtor to agree to various restrictions on the operation of the debtor's business. The creditor will require both affirmative and negative covenants by the debtor in order to (a) provide the creditor with early warning signals that the loan must be carefully watched and, more importantly, (b) permit foreclosure before the value of the debtor's business as a going concern is severely reduced. Generally, nothing unusual marks the covenants included in loan agreements between leverage creditors and debtors. Most medium and longer-term loan agreements include similar covenants by which the debtor agrees to maintain a given ratio of net worth to liabilities and a certain net worth. The debtor also will agree to maintain given ratios of liquid assets to liabilities and perhaps a specific capital expenditure budget. Such covenants are called affirmative covenants because they require the debtor to conduct its business to satisfy the covenants. In addition, the debtor will agree to refrain from entering into certain transactions. For example, the debtor may agree that it will not, without the creditor's consent, pay dividends, repurchase stock, borrow from other lenders, grant security interests in its property, acquire other companies, or be acquired by another company. The debtor may also agree not to enter into new lines of business without the creditor's consent. Such negative covenants give the leverage creditor a veto power over proposed activities by the debtor.

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[39] U.C.C. §§ 9-501, 9-504 (1978); *see also* U.C.C. § 1-203 (1978)("every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement").

Either type of covenant may provide sufficient control over the debtor to make the leverage creditor a fiduciary if its enforces its rights.[40] The control criterion should be satisfied if the covenants operate as a substantial restriction on the flexibility of the corporate management to deal with changing circumstances. In general, the more stringent the covenants, the more control the creditor has, and the more likely it is that the creditor is a fiduciary to at least some interests in the corporation. Whether the fiduciary duty (which is created upon enforcement of the covenants) is breached in the course of that enforcement is a separate issue, one which will be discussed in Part IV.

III. Limiting the Principle: To Whom Is the Duty Owed?

We turn now to the crucial question left open by Justice Douglas in *Pepper v. Litton* — what groups are included in the "community of interests" in the corporation. It is this question upon which theories explaining the fiduciary principle ultimately flounder.[41] As Shepherd recognizes, the fundamental weakness in the fiduciary concept is its inability to distinguish with an acceptable degree of certainty those cases of contractual relationships in which fiduciary duties exist from those in which the recognition of duties would only hinder attainment of the benefits which the fiduciary principle is intended to foster.[42] A limiting principle is therefore needed to identify those persons dealing with the corporation who should be beneficiaries of a fiduciary duty. Denominating someone a fiduciary is meaningless unless it is also clear to whom the fiduciary duty is owed. Traditional fiduciary doctrine focuses for the most part on two-party relationships such as attorney-client or principal-agent. Yet in the corporate situation, the fiduciary duty has frequently been

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[40] Affirmative covenants are sometimes viewed as a more substantive interference with the management of a debtor, because the creditor has essentially put a gun to management's head and forced it to engage in certain activities. However, that view is unrealistic. Except in rare circumstances, the leverage creditor does not force management to do anything. Both affirmative and negative covenants really tie management's hands. Affirmative financial covenants are intended to prevent the debtor from overextending its business. The purpose of negative covenants is the same.

[41] *See supra* note 21.

[42] Shepherd, *supra* note 22, at 78-79.

extended to third parties not in privity with the fiduciary, including, for example, the duties owed by director to shareholder or by controlling shareholder to creditor. Thus, a limiting principle must deal with two variables: the relationship between the fiduciary and the corporation and the relationship between the corporation and the beneficiary of the duty.

The determinative factor in the first relationship is the fiduciary's ability to control actions or policies of the corporation.[43] Control refers not simply to voting control, but to any power to direct actions or policies of the enterprise.[44] For example, the combination of a stock pledge or security interest in the corporation's assets and affirmative or negative covenants which give a leverage creditor the right to prohibit various actions by the corporation constitutes control by the leverage creditor. The mere *right* to control, however, does not give rise to a fiduciary obligation. As Shepherd has recognized, only the exercise of that control gives rise to a fiduciary obligation.[45] Unexercised control should not create a fiduciary obligation, since unexercised control neither affects the operation of the enterprise nor interferes with the legitimate expectations of other interests in the corporation.

Similarly, a distinction must be made between total and limited control. When a corporation is formed, a controlling shareholder and the directors as a board have total control over the corporation's actions and policies. However, every contract made by the corporation transfers some control because each contract, to the extent it is legally enforceable, limits the discretion of the board and shareholders. Total control is therefore unlikely to exist in any one person or group. Control over any substantial aspect of the corporate enterprise's affairs is sufficient to establish a fiduciary relationship, but the obligations flowing from that relationship are confined to the matters which the alleged fiduciary controls. For example, a customer with a valuable exclusive territory may have a fiduciary obligation with

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[43] Southern Pacific Co. v. Bogert, 250 U.S. 483, 487-88 (1919).

[44] *See generally* Sommer, *Who's "In Control"?—S.E.C.*, 21 BUS. LAW. 559, 562-83 (1966)(detailed discussion of control).

[45] Shepherd, *supra* note 22, at 68-71. "Exercise" as used here includes any restraint on corporate action resulting from the perceived likely response of the leverage creditor.

respect to marketing the corporation's products in the territory, but he has no special obligation with respect to his financial dealings with the corporation. Properly identifying the nature and scope of control serves as a basic limitation on the scope of the fiduciary principle, because only those interests in the "community of interests" which are affected by that control are entitled to enforce the fiduciary obligation.

The second variable that determines the beneficiary of the fiduciary obligation is the relationship of the purported beneficiary to the corporation. The protected class could range from those in privity of contract to the general public. Corporation law has generally extended fiduciary protection only to equity capital interests; protection of creditors and other contributors of resources to the corporate enterprise has been limited to bankruptcy and waste situations or to those parties who are in privity of contract with the fiduciary.[46] We can immediately reject the latter limitation. As previously discussed, fiduciary relationships, although often rooted in contract, are not so limited. For instance, neither directors nor controlling shareholders are in privity with other shareholders. Even though a leverage creditor has made no formal commitment to anyone other than the corporate debtor, and even though the leverage creditor has not received consideration from others, he nevertheless may owe a fiduciary obligation to third parties. The fiduciary obligation is rooted not in contract per se but in the expectations regarding benefits that come from control over resources. Whether that control is transferred by a contract or some other means is irrelevant.

One cannot so easily dismiss the contention that the duty is owed to the public. While recognition of such a broad duty could hardly be termed a limiting principle, the concept of a social responsibility does have some impressive authority to recommend

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[46] *See generally* Douglas-Hamilton, *Creditor Liabilities Resulting From Improper Interference With the Management of a Financially Troubled Debtor*, 31 BUS. LAW. 343, 348-52 (1975)(discussing equitable adjustments of intervening creditors' claims in bankruptcy or reorganization proceedings and liability under securities laws and common law); Enstam & Kamen, *Control and the Institutional Lender*, 23 BUS. LAW. 289, 319-25 (1968)(discussing creditors' potential for control through restrictive covenants, specific restrictions, reorganization, and bankruptcy).

it. Indeed, Justice Douglas' formulation in *Pepper v. Litton* implies an extension of a controlling shareholder's fiduciary duty to the entire public. Justice Douglas states at one point in the opinion that the shareholders' relationship to the corporation requires good faith and fair dealing in every transaction which may injuriously affect the rights of creditors and the general public.[47] This contention could be dismissed as obiter dictum, since *Pepper v. Litton* dealt specifically with a creditor's claim against the sole shareholder of a corporation.[48] However, the Supreme Court was dealing with a much broader issue: the ability of a bankruptcy court to subordinate upon equitable grounds claims of creditors of the bankrupt. As discussed above, Justice Douglas' opinion focuses on the control aspect, and it is unlikely that either Justice Douglas or the Court intended the decision to be limited to its facts. Indeed, *Pepper v. Litton* is perhaps the leading case on the fiduciary principle in the corporate context. Furthermore, although Justice Douglas is perhaps more remembered for his positions on civil liberties and his somewhat less articulate opinions on business-related issues during his later years,[49] it should not be forgotten that he was a founding father of the Securities and Exchange Commission and an expert on bankruptcy.[50]

Justice Douglas was not alone in his belief that a duty is owed by one controlling a corporation to the general public. Professor Dodd argued in his debate with Professor Berle during the 1930's that directors of a corporation have a fiduciary responsibility to the public.[51] He relied on historical precedent and what he viewed as prevailing public opinion to establish that the discretion of managers of economic units had always been limited by the dictates of public policy.[52] Ralph Nader and Com-

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[47] *Pepper*, 308 U.S. at 309 n.19.

[48] *See supra* note 15 and accompanying text.

[49] As an example, see Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971).

[50] *See generally* V. COUNTRYMAN, DOUGLAS OF THE SUPREME COURT 119-43 (1977)(case opinions on bankruptcy authored by Douglas).

[51] Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147-48 (1932); A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 166-67 (1954)(concedes that fiduciary relationship exists between corporate directors and public).

[52] Dodd, *supra* note 51, at 1146-48 (public opinion that views corporations as eco-

mon Cause have sustained and advanced the argument to this day.[53]

To argue that an obligation is owed to the public, however, presumes that the interest of the public can be identified. In all likelihood, there is no single public interest but rather the competing claims of several different interests. Of course, management's duties need not be limited to profit-making if the benefits obtainable from imposing a broader duty exceed the costs incurred. It may be that the public interest can be broken down into more specific interests and then ranked according to a scale of merit or need. The law could then require corporate management to accommodate those interests whenever and to the extent that it could do so without harming higher-ranked interests.

An understanding of the purposes of a social responsibility duty and of a fiduciary duty demonstates, however, that such an identification and ranking process is neither necessary nor desirable. Proponents of corporate social responsibility desire a more equitable, and perhaps more efficient, distribution of resources and wealth. The primary focus has been on operational input-output decisions such as affirmative action hiring, pollution control, advertising, and product safety, and not on structural decisions. Such operational decisions clearly affect persons having no direct relationships with the corporation, persons who are neither creditors, suppliers, employees or customers, but whose property or personal rights or desires may be adversely affected by corporate action or inaction. The focus of the fiduciary doctrine is more modest; it is designed to govern the integrity and fairness of certain relationships, whether contractual or otherwise. It attempts to protect the legitimate investment expectations of those *involved* in an enterprise rather than the health,

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nomic institutions with duty of social service affects legal theory).

[53] The main issue in the leading social responsibility cases is whether those controlling a corporation owe a duty simply to shareholders to maximize short-run profits or whether they can or must take broader interests into account. *See, e.g.,* Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668, 681-82 (1919)(business corporation is organized primarily for benefit of shareholders; equity required dividend when corporation had large cash surplus on hand). In most cases the issue is simply whether management has the option to maximize long-run profits. *See, e.g.,* Shlensky v. Wrigley, 95 Ill. App. 2d 173, 237 N.E.2d 776, 778 (1968)(compelled installation of lights at Wrigley Field by stockholders might raise short-term revenues but injure long-term profits).

safety, or general welfare of those *affected* by the enterprise.

This difference in focus or purpose justifies a difference in scope. The social responsibility concept seeks primarily to protect substantive interests from injury. The fiduciary concept protects primarily a process; it requires no specific result (for example, safe products or clean air) but a fairness in performance of obligations or exercise of rights involved in a relationship to provide the benefits expected by the beneficiary. Limitations on the fiduciary duty, if any, should be based on the type of relationship the beneficiary has with the corporation and with the fiduciary. Members of the public are clearly affected by the corporate enterprise if they must breathe the air it pollutes, and they therefore have a relationship with it. However, the question for our purposes is whether a given relationship is so riddled with questions of transferred control and expectations of benefits that the law should insure that the relationship retain some attributes of fairness.

A focus on legitimate expectations suggests that the nature of the corporation as an economic unit may be a source of a limiting principle. To focus on the legal labels applied to economic relationships inordinately narrows the application of the fiduciary principle.[54] In the corporate context such a focus unduly emphasizes the nature of the resource transferred to the enterprise (money as opposed to services or products). Even within the narrow class of capital investments, labelling ignores the more subtle aspects of the relationship. The relationship of a holder of preferred shares to a corporation may be virtually identical to that of a holder of subordinated debentures of another corporation; their respective rights should not depend on the label used but on the nature of the relationship itself.

For example, participants in the corporate enterprise can be divided into those with mere expectancies and those with reliance interests. The former group would include suppliers or customers who deal with the corporation on a "spot" basis. A leverage creditor that has the power effectively to preclude the corporation from dealing in the future with such parties or to condition dealings upon different terms than those traditionally

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[54] *See supra* part II(B) of this article.

available certainly may have an adverse effect on such claimants. However, the impact would stem not from the relationship between the corporation and the claimant but from that between the leverage creditor and the corporation. The claimant has not transferred or surrendered control over any rights or property to the corporation or to the leverage creditor for which the claimant expects any benefits. The quid pro quo is exchanged at the time of or in connection with each individual transaction; there is no term relationship whose integrity must be assured. The fiduciary concept was developed to regulate those relationships where one party has for some reason become dependent on the other.[55] Those who deal with a corporation at will cannot demonstrate such dependency.

Fiduciary protection should therefore be limited to those who have relied on the constitution of the corporation by contributing capital (resources that are to be used by the enterprise to produce wealth for the common good). "Reliance" is used in its usual sense of a potentially detrimental change in position.[56]

Because the tendency is to protect reliance only when reliance is reasonable, a putative fiduciary might argue that no duty should be owed to those claimants who allocated resources to the corporation without first obtaining assurances that the value of that investment would be protected. A leverage creditor's argument might be as follows: any supplier that invested in special equipment or capacity to serve the corporation's needs could have protected itself from the risk of a change in control by entering into a long-term contract with the corporation. This argument should be rejected. The fiduciary principle is designed to fill the gaps in those relationships where the parties could not or did not establish limits on the fiduciary's behavior. In the pre-

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[55] *See* Beane, *The Fiduciary Relationship of a Partner*, 5 J. CORP. L. 483, 486-87 (1980)(origin and development of fiduciary duties); *see also* Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 546 (1928)(classic formulation of obligation of joint venture fiduciaries).

[56] Examples of reliance would include development of specialized capacity to serve the corporation's needs, development of good will which inures not only to the benefit of the claimant but also to the corporation or, in the case of employees, development of skills peculiar to the corporation's business. More specifically, reliance in this sense is any allocation of resources which is more efficient (has a higher market value) when used in conjunction with the corporation's business than when allocated for other purposes.

sent context, the question should not be whether a claimant could have protected itself, but whether there is a justification for protecting the claimant. The answer offered is that a claimant should be protected where it is economically efficient to do so.

The reasonableness issue under discussion really stems from the fact that there have been two allocations of resources to the corporate enterprise, one by the claimant and one by the leverage creditor. Cases such as *Pepper v. Litton* tell us how the fiduciary principle regulates the relationship between corporate management and creditors, but those cases do not deal with the rights of two claimants.[57] The same efficiency considerations that govern the rights of claimants against the corporation, however, should govern the relationships among those dealing with the enterprise. Instead of focusing on the reasonableness of a claimant's reliance on maintenance of pre-buyout control, the focus should be on the relative benefits to be gained from the transfer of control to the alleged fiduciary.

In general, transfers of control of corporations are desirable if they result in more efficient operations. The imposition of a fiduciary obligation in connection with a transfer of control is in a sense a restraint on alienation which should be disfavored. However, there is less reason to protect transferees of control in LBOs against other claimants. The LBO phenomenon is due in large part to a confluence of factors which have nothing to do with increased efficiency. LBOs owe their existence in part to the fact that the federal income tax laws make interest payments to leverage creditors deductible, whereas dividend payments to shareholders are not deductible.[58] Moreover, there would be fewer LBOs if federal and state banking laws did not limit bank involvement in nonbanking activities and generally prohibit equity investments by banks.[59] Continuing product restraints on banks, combined with the current unfavorable situa-

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[57] *See, e.g., Pepper*, 308 U.S. at 306-13 (fiduciary relationship between management and creditors based on equity).

[58] *See* Tomlinson v. 1661 Corp., 377 F.2d 291, 295 (5th Cir. 1967)(interest deductible if (1) indebtedness, (2) interest on indebtedness, (3) paid or accrued within tax year).

[59] *See* Clarke, *The Futility of Current Approaches To Bank Regulation*, 4 J.L. & COM. 213 (1985).

tion in international lending, mortgage lending, and energy, have induced banks to look eagerly to buyouts as a source of higher than average yields. LBOs also appear to be an inefficient means of solving related financial problems. Sellers in many LBOs have been conglomerates that sold subsidiaries which no longer fit long-range plans.[60] These transactions appear to improve the conglomerates' balance sheets and profit statements more than they provide efficient management. Buyouts also have been justified on the ground that private ownership would allow management to concentrate on long-term growth rather than short-term profits in order to support dividend payments.[61] While the goal may be lauded, the underlying problem is more a reflection of the inefficiency of our capital markets than a justification for LBOs.

Though some of these factors may have contributed to a public interest in encouraging LBOs, that interest does not justify providing leverage creditors with priority over the claims of other interests in the corporation which may have "unreasonably" relied on the status quo. An LBO may result in a more efficient allocation of resources, but it is unlikely that its pro-efficiency benefits outweigh the inefficient results of ignoring the claims of "unreasonable" reliance interests. Of course, this is true only because we have defined reliance in terms of efficiency.

IV. The Scope of the Fiduciary Obligation of a Leverage Creditor

Just as it is meaningless to conclude that a leverage creditor has a fiduciary obligation without considering to whom that obligation is owed, it is also meaningless to conclude that a leverage creditor has a fiduciary obligation to persons who relied on the pre-buyout constitution of the corporation without determining what the scope of that duty is. To state that a motorist has a duty of care to other motorists on a highway does not provide

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[60] *See* Sandler, *Wall Street Finally Discovers The Leverage Buyout*, Inst. Investor, Aug. 1982, at 88 (noting that in 1960's conglomerates often swallowed up unwanted acquisitions as pieces of larger companies); *see also* Meyer & McGough, *supra* note 5, at 38-39 (listing of 20 LBOs since 1978).

[61] Sandler, *supra* note 60, at 89.

much insight. To state that the motorist has a duty to act reasonably so as not to harm other motorists also does not provide much insight into determining whether a specific motorist has been negligent. The situation is the same here. The standard wisdom, expressed in diverse ways,[62] is that a fiduciary's obligation to the beneficiary is one of good faith and fair dealing. This standard sheds little light on the obligation of a leverage creditor to the rest of the "community of interests" in the corporation. What a leverage creditor really wants to know is whether it can enforce the covenants in its loan or security agreement with the debtor.

The few courts that have addressed this issue have found no objection to the enforcement of such covenants.[63] The rationale seems to be that the covenants merely fulfill the expectations of the leverage creditor and the debtor to maintain the loan at the same risk the creditor agreed to bear when it entered the transaction. However, this view may overstate the creditor's case. If the financial ratios and negative covenants merely reflect that status and practice of the debtor at the time of the LBO, there can be little objection to enforcement of such covenants because there has been no real transfer of control, no change in the risks borne by other interests. The leverage creditor, however, may use those standards as minimums and impose more stringent standards over the life of the loan. This might occur if the lender is concerned about inflation, higher interest rates, changes in technology, or other factors affecting the debtor's markets. Imposing higher standards, if reasonably related to the original risk, should not constitute a breach of duty, but evaluation of the factors involved would seem extremely difficult.

In other words, the mere fact that the covenants are stringent does not mean that the creditor cannot enforce them. Rather, the inquiry should be to what extent the leverage creditor has in effect shifted the risk of loss on its loan to other interests of the corporation. If the concepts of good faith and fair

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[62] *See, e.g.*, Beane, *supra* note 55, at 484-90 (discussing definition and scope of fiduciary duty); *see also* Kaplan, *supra* note 9, at 887-88 (range of fiduciary duties).

[63] *See, e.g.*, Matter of Teltronics Servs., Inc., 29 Bankr. 139, 168-73 (Bankr. E.D.N.Y. 1983)(collection and discussion of cases).

dealing mean anything, the fiduciary should not be able to shift risks which it is compensated for bearing. A leverage creditor may use either affirmative or negative covenants to force the corporation and other interests down a road they would prefer not to travel. The leverage creditor breaches its fiduciary duty to the extent that enforcement of the covenants shifts to those other interests the risk of nonpayment due to the leveraged nature of the corporation's finances.

Conflict is inherent in the relationship between secured lenders and other interests in the corporation. The lender's return on its investment is generally limited to a contractually determined interest rate. Consequently, it does not participate in the higher rewards associated with greater risk taking. Other parties may receive a return on their investment only if the corporation undertakes more profitable and more risky advertures. In the same vein, as long as a lender is adequately secured, it has no reason to change the status quo. There is no downside risk. For the other interests, though, the status quo may be a death warrant either because (as in the case of shareholders and unsecured creditors) the liquidated value of the assets is insufficient to provide a return or because (as in the case of suppliers, distributors, and employees) the life span of the business as presently constituted is not sufficient to compensate their reliance interest. Consequently, a troubled business is sure to cause disagreements among various parties over the business' future.

A railroad, for example, may find it a necessity to modernize its equipment in order to compete with other modes of transportation. The alternative would be stagnation and eventual loss of business. Modernization, however, would require significant capital outlays, which could not be made without the approval of the leverage creditor. If the creditor's original forecasts were accurate, the liquidation value of its collateral or the earnings of the nonmodernized business should be sufficient to assure repayment. If modernization were regarded as expensive and relatively risky because it might cure only some of the railroad's competitive disadvantages, then the creditor might conclude that the benefits of successful modernization would primarily accrue to other interests. The costs of failure, however, would fall primarily on the creditor, because future earnings would be re-

duced. Meanwhile, the liquidation value of the newly modern collateral might decrease sharply if the industry in general suffers. In these circumstances, a reasonable banker would deny approval for the proposed action. If the leverage creditor's loan agreement is enforceable according to its terms, the creditor has no problem. However, the other interests in the corporation —subordinated creditors, suppliers, employees, and customers—would be likely to back management's action. If the leverage creditor protects its interest and vetoes the action, it may have ultimately increased the downside risk to other interests. In the absence of the creditor's security covenants, the debtor would have been free to make the proposed change and the leverage creditor would have been at risk.

Under the foregoing analysis, such a shift of risk will violate the leverage creditor's fiduciary duty if, but only if, the protection sought by the covenant exceeds that which would have been obtainable by a secured lender making an *un*leveraged loan. A leverage creditor should not be penalized simply because it is a leverage creditor unless the enforcement of security covenants (that is, interference with modernization) springs from the leveraged nature of the transaction.[64] Given such a rule, when the further risk of traditional equitable subordination *a' la Pepper v. Litton*, faced by every dominant creditor, is taken into account, the leverage creditor may decide that its best course of action is to permit the change, because the risk of subordination is greater than the incremental risk presented by modernization.

Admittedly, almost all courts which have considered the specific issue of the duty of a secured creditor to other interests (most particularly unsecured creditors) have held that no duty is breached as long as the lender does only what is reasonably necessary to protect its position as a creditor.[65] Judicial opinions have stressed contract rights over fiduciary obligations, primarily on the basis of an *ex antecedentibus* view of the parties' relationships. Because the secured creditor did not have a fiduciary

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[64] *See infra* text at 56-65 (discussion of the point).

[65] *See* Matter of Teltronics Servs., Inc., 29 Bankr. 139, 169-70 (Bankr. E.D.N.Y. 1983)(noting rarity of exceptions to general rule that creditor is *not* fiduciary to his debtor).

relationship with other interests before making the loan, it can exercise its rights without concern for whether it is harming those other interests. If the lender receives nothing but a "normal commercial profit," the transaction is at arm's length and no fiduciary duty exists.[66] Professor Berle has stated the following view: "A bank undeniably has a clear right in respect of each individual transaction to make any proper conditions looking toward the security and repayment of the loan: that is its business."[67] Berle's statement is undeniably correct so far as it extends to the right of a leverage creditor to impose covenants in the first place and to the creditor's action in reliance on those covenants. The problem, however, is to determine what are "proper conditions." The leading case, *In re Prima*,[68] predates much of the development of the fiduciary doctrine. *Pepper v. Litton* and cases such as *Jones v. H.F. Ahamanson & Co.*[69] represent a more enlightened view that the fiduciary doctrine is designed not merely to prohibit self-dealing at the expense of the beneficiary but to prevent action which *unnecessarily* (as opposed to *unreasonably*) deprives the beneficiary of the fruits of its investment. Earlier cases viewed fiduciary relationships as a zero sum game: If a creditor has a right to take certain action against the borrower, then other creditors are doomed to suffer the loss and have no right to object.[70] A better view is that the fiduciary relationship runs directly from the secured creditor to other interests in the corporation. It is fallacious to speak of the secured creditor's right, since that right was granted by the corporation subject to the rights and claims of other interests in the corporation. To presume that other interests would consent to the possibility that a creditor who has given them no benefit

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[66] Douglas-Hamilton, *supra* note 46, at 355.

[67] Berle, *Banking Under the Anti-Trust Laws*, 49 COLUM. L. REV. 589, 603-04 (1949).

[68] 98 F.2d 952 (7th Cir. 1938), *cert. denied*, 305 U.S. 658 (1939).

[69] 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969); *see also* Diamond v. Oreamuno, 24 N.Y.2d 494, 499, 248 N.E.2d 910, 912, 301 N.Y.S.2d 78, 81 (1969)(function of fiduciary principle is to remove inducement of any action which might cause harm to enterprise).

[70] *See, e.g.*, Case v. Los Angeles Lumber Co., 308 U.S. 106, 114 (1939)(approval of reorganization plan by majority of stockholders to detriment of creditors is "not fair and equitable" and cannot be approved by court).

could wipe them out is unreasonable.

The issue concerning conflicting interests is more analogous to the "Chinese Wall"[71] and *Zahn v. Transamerica*[72] situations than to the normal arm's length transaction. It is no answer to state that the actions by the bank in "Chinese Wall" situations or the votes by the directors in *Zahn v. Transamerica* situations are arm's length. The real question is whether a party with conflicting duties has freedom of action. A leverage creditor, which has a fiduciary obligation to its own shareholders, has voluntarily assumed a position (in return for premium interest rates) that places it in a control relationship with parties who cannot protect themselves. The argument that the creditor must have freedom of action in order to protect its investment (or its shareholders' investment) is simply beside the point. As long as the leverage creditor has voluntarily assumed a position requiring it to protect others, it must bear the risks involved, and its shareholders must bear the risk of retaining the management which made the decision.

Our task is to identify those factors which cause a leverage creditor to have a more burdensome duty than a normal lender who has taken a security interest in all of a debtor's assets and has the same affirmative and negative covenants in a loan agreement. Lenders in both categories are fiduciaries in the exercise of their powers under the loan agreement. They are fiduciaries because the covenants and the security interests give them control over the corporate enterprise and over the interests of other persons in that enterprise. They owe a fiduciary obligation to those groups or interests whose fortunes are inextricably entwined with the corporation in the sense that they could not participate in other economic undertakings except at substantial

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[71] The "Chinese Wall" refers to the conflict faced by a bank whose trust department has invested in securities of one of the bank's commercial customers. The bank has conflicting obligations regarding use of adverse information it receives concerning the customer. It has a fiduciary obligation to the beneficiaries of the trusts which hold the customer's securities and it also has an obligation to the customer to maintain the confidentiality of information disclosed to it by the customer.

[72] 162 F.2d 36 (3d Cir. 1947). *Zahn* dealt with the obligations of a board of directors when various classes of the corporation's securities have conflicting interests regarding proposed corporate action. *See also* Speed v. Transamerica, 235 F.2d 369, 371 n.3 (3d Cir. 1956)(later decision in same litigation).

cost.

To some extent, the scope of a fiduciary duty depends on the same factors which determine the existence of a fiduciary obligation. In general, the stronger the reasons for finding that a leverage creditor is a fiduciary, the broader the scope of the obligation. Perhaps the most significant factor in determining the scope of the fiduciary relationship between the leverage creditor and other interests is the creditor's role in creating the risk that may adversely affect the interests of the other parties. Adverse effects include higher interest expenses and the reduced flexibility available to the corporation in overcoming short-run problems. An acquisition that is financed through loans secured by the target's assets rather than through the issuance of equity securities requires the leverage creditor to bear some responsibility for these potentially increased risks. The leverage creditor should bear the risk of loss from leverage because he is getting paid to take that risk. To permit the leverage creditor to shift its risk of repayment to other interests would provide a windfall to the leverage creditor. Thus, one way to evaluate whether a leverage creditor has breached its fiduciary obligation to other interests is to determine whether the leverage creditor would have reached the same decision (that is, would have exercised control in the same manner) if the corporation were not leveraged but had a capital structure similar to other corporations with which it competes. This approach recognizes that the source of the creditor's duty is the transfer of control from management and shareholders, and that the duty imposed should be no broader than necessary to protect other interests from that change in control. In other words, it is both the change in relative priority that accompanies an LBO and the transfer of control over the management issues dealt with by the covenants that establish a fiduciary obligation and help define its scope.

A second factor which should influence the scope of the fiduciary obligation of a leverage creditor is the extent to which the corporation, and therefore its "community of interests," has benefited from the transfer of control that created the fiduciary relationship. To the extent that the benefits to the corporation and its interests justify the control, use of the fiduciary principle is not necessary to ensure commercial integrity. Every contract

entered into by a corporation effectively transfers some control to the other party because it reduces management's future discretion. However, the exercise of the other party's contractual rights against the corporation does not breach a fiduciary obligation to other interests unless the *right* exercised is not commercially reasonable. Reasonableness is measured in the sense that rights (or powers) transferred are not substantially in excess of the benefits bestowed upon the corporation pursuant to the contract. The leverage creditor may have a fiduciary duty to debenture holders because they have interests in the corporation, but the duty may not be breached when the creditor enforces its rights and wipes out the debenture holders. The creditor should have the right to prove that the buyout accomplished more than simply a change in equity ownership. For example, the buyout may have produced better management, stronger financial backing, or better access to markets. Such evidence, while admittedly difficult to prove as fact, supports the leverage creditor's claim that the debenture holders were compensated for the increased risk but that the enterprise failed anyway.

A third factor relevant in determining whether a leverage creditor has breached a fiduciary obligation to a competing interest in the corporation is the reasonableness of the leverage creditor's specific *exercise* of control. The fact that the creditor's action may have been specifically provided for in the loan agreement or that the creditor acted in subjective good faith should be insufficient to avoid liability. The question should be whether the leverage creditor deprived the beneficiaries of the fiduciary duty of their legitimate expectations in dealing with the corporate enterprise. The expectations are not interfered with by an exercise of discretion reasonable under the circumstances that does not shift the risk of repayment to the beneficiary class. Competing interests in a corporate enterprise cannot reasonably expect that management can retain autonomy. Because the leverage creditor has in fact taken the place of the equity interests in the corporation, it should be entitled to exercise whatever rights those interests could have exercised without objection from other interests of the organization. For example, a leverage creditor should have greater freedom in approving changes in corporate management or mergers with other enterprises than it

does in exercising its rights under financial covenants. The structural changes are in the domain of common shareholders; the financial matters, however, are more typical of a creditor's rights. Greater financial freedom for the creditor arguably alters the constitution of the corporation and therefore adversely affects the legitimate expectations of other interests.

A fourth factor of primary relevance in determining the scope of a leverage creditor's fiduciary obligation should be the extent to which the claims of one interest, such as labor, conflict with the interest of another group, such as subordinated creditors, so that any decision will necessarily affect adversely at least one interest. At a minimum, the creditor should not be permitted to take any action or impose any new conditions which unnecessarily increase the risk of the resulting disadvantaged party. Beyond that, an analogy could be drawn to *Zahn v. Transamerica*[73] where the court imposed an obligation on the board to further the interests of the group with the least degree of protection over that usually afforded true common shareholders. Where a leverage creditor is faced with a decision which will necessarily harm one interest, its fiduciary obligation should be measured with respect to the group which is least able to protect itself. The leverage creditor, as recipient of control formerly possessed by shareholders and management, should have the same fiduciary obligations as would those groups in such conflicts.

The final significant factor that defines the scope of a fiduciary obligation in the corporate context should be the independence of the creditor's decision. This is particularly relevant in the buyout situation because the leverage creditor is generally part of a syndicate whose rights are exercised jointly. The issue is whether a member of a syndicate that enforces a covenant breaches its fiduciary duty even though that member voted against enforcement. The argument is persuasive that a member of a syndicate, like a director of a corporation, satisfies its fiduciary duty simply by recording its "no" vote, since it cannot prevent the action.[74] However, such a rule would encourage brinkmanship by syndicate members to avoid liability while

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[73] *See* 162 F.2d at 36; *supra* note 72 and accompanying text.

[74] *E.g.*, MODEL BUSINESS CORP. ACT § 35 (1979).

reaping the benefits of enforcement. A better view might be to require a creditor to waive the benefits of enforcement in order to avoid liability.[75] This position seems preferable to holding dissenting creditors liable for the breach of duty solely on the ground that they helped create the risk of breach in the first place.

CONCLUSION

The law of fiduciary relationships is such a morass because characterization and blind application of hornbook rules have replaced consideration of the policies underlying the fiduciary principle and their application to the economic and other facts of particular cases. A characterization process would lead to the conclusion that a leverage creditor has no fiduciary obligation to any person with a legal or economic interest in the corporation. The analysis proposed here would reach a contrary conclusion, although the ultimate business result might be the same if a leverage creditor could enforce its rights without breaching its duty. By combining the classic though broad statement of the fiduciary principle of *Pepper v. Litton,* an appreciation of the role of the principal in ensuring commercial integrity in long-term relationships, and an economic approach to identification of interest in the corporation, the analysis offers a more sophisticated approach to the rights of corporate investors than the "all or nothing" approach of characterization.

Because LBOs present especially difficult problems of control, efficiency, and legitimate expectations of participants in the corporate enterprise, no clear conclusions can be reached regarding the fiduciary responsibilities of a leverage creditor, except that the creditor should not automatically be entitled to rely on the arm's length defense. The nature of LBOs appears to justify a conclusion that a leverage creditor is a fiduciary; however, only a factual consideration of a particular case can determine whether the rights of the creditor should be subordinated to those of a particular person or group with an economic interest

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[75] For example, the creditor's security interests could be partitioned. The dissenting creditor's interest or rights in collateral not foreclosed would be unaffected.

in the corporation. At least the parameters of the inquiry are clear. Courts should investigate the ability of beneficiaries of the duty to reallocate their resources to other enterprises without loss; the possibility that the leverage creditor is shifting a risk that it created; and the commercial reasonableness of the creditor's actions in light of their impact on the benefits legitimately expected by those beneficiaries.

These issues may be difficult to apply to large enterprises, but the analysis is valid. The analysis is equally applicable to disputes among creditors and investors in close corporations. Because participants in a commercial enterprise can be presumed to share a desire to maximize profits, the use of economic analysis and a focus on expectations and risks allocations are appropriate analytical tools. Moreover, the facts needed to employ these tools are susceptible to proof without undue speculation. While further refinements in the approach are necessary, even a rudimentary application of these concepts will result in more sensible decisions than those reached by simply characterizing transactions as fiduciary or arm's length.

DEATH WITH DIGNITY IN MISSISSIPPI? AN ANALYSIS OF MISSISSIPPI'S NATURAL DEATH ACT

*Michael Vitiello**

I. Introduction

At the same moment that medical developments have increased our life span, Americans have become preoccupied with death. Once a subject considered taboo, the right to death with dignity is now the frequent subject of popular and professional attention,[1] and has inspired the formation of groups to advance the cause of this "right."[2] A federal commission appointed to study ethical problems in medicine and biomedical research surmised that our current interest in death with dignity stems from a number of causes: first, "death is less of a private matter than it once was. Today, dying more often than not occurs under medical supervision"; second, biomedical developments "have made death more a matter of deliberate decision. For almost any life-threatening condition, some intervention can now delay the moment of death . . . . [This is] a development that has profound ethical and legal implications"; third, courts, legislatures, and commentators have become increasingly involved in a public debate about death because medical technology often "renders patients less able . . . to direct the course of treatment," thereby requiring someone other than the patient to

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[1] *See* President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 1 (1983)(discussing in detail ethical aspects of rejecting various forms of life-support) [hereinafter cited as Commission Report].

[2] *E.g.*, Society for the Right to Die, 250 West 57th Street, New York, N.Y. 10107 (one of several groups promulgating living wills). For a listing of other groups that have promulgated living wills, see Commission Report, *supra* note 1, at 139 n.51.

make treatment decisions for the patient.[3]

As a result of the increased interest in death and dying, the need for legislation in this area is generally acknowledged. Unless it is clear that a patient has a right to refuse treatment, health care professionals may compel a patient to accept unwanted, intrusive therapies that provide marginal net benefit.[4] To assert his right to refuse treatment, the patient must initiate expensive and time-consuming legal proceedings.[5] Further, that process often makes intimate details of a patient's illness a matter of unwanted public scrutiny.[6] Many people have executed living wills[7] even in the absence of enabling legislation with the hope that they will be spared this traumatic legal struggle.[8]

Health care professionals have an interest in legislation as well. Legislation assists hospitals in establishing policies to govern the withdrawal of treatment.[9] Without legislation or clear

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[3] COMMISSION REPORT, *supra* note 1, at 1-2.

[4] *See, e.g.*, Satz v. Perlmutter, 362 So. 2d 160, 164 (Fla. Dist. Ct. App. 1978)(terminally ill patient, forced by hospital personnel to accept treatment despite his repeated requests to die, allowed to remove artificial life-sustaining device based on constitutional right of privacy), *aff'd*, 379 So. 2d 359 (Fla. 1980).

[5] In a number of cases, the patient died before a final decision could be rendered. *See, e.g.*, John F. Kennedy Hosp. v. Bludworth, 452 So. 2d 921, 923 (Fla. 1984)(patient died over three years before final decision); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1219 (1985)(patient died prior to decision by New Jersey Supreme Court); *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 66 (consolidated cases in which both patients had died prior to decision by New York Court of Appeals), *cert. denied*, 454 U.S. 858 (1981).

[6] *See, e.g., In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1217-18 (1985)(discussing in detail patient's physical and mental condition).

[7] Living wills are "documents . . . by which individuals can indicate their preference not to be given 'heroic' or 'extraordinary' treatments." COMMISSION REPORT, *supra* note 1, at 139.

[8] One group, Concern for Dying, has circulated millions of copies of standard form "living wills" in a pamphlet entitled *Questions and Answers About the Living Wills*, *cited by* COMMISSION REPORT, *supra* note 1, at 139 nn.49 & 52. The terms "living wills," "advance directives," and "declarations" are used largely interchangeably to refer to a document which "lets people anticipate that they may be unable to participate in future decisions about their own health care . . . [and] specifies the types of care a person wants (or does not want) to receive . . . ." COMMISSION REPORT, *supra* note 1, at 136. Only recently has a court been faced with an unconscious patient who had executed a living will. That court found the document was "persuasive evidence of [an] incompetent person's intention and [thus] should be given great weight" by the patient's surrogate decisionmaker. John F. Kennedy Hosp. v. Bludworth, 452 So. 2d 921, 926 (Fla. 1984).

[9] *See, e.g.*, Bayley, *Who Should Decide?*, in LEGAL AND ETHICAL ASPECTS OF TREATING TERMINALLY ILL PATIENTS 3, 10-11 (A. Doudera & J. Peters eds. 1982)(commentary

judicial pronouncements, acquiescence in a patient's or his surrogate's refusal to accept treatment may leave the health care provider open to suit[10] or to criminal prosecution.[11] That fear may make patients and health care providers potential adversaries, with litigation rather than consultation determining the appropriate course of treatment.[12] Courts have frequently requested legislative action to define the parameters of a right to refuse treatment and to establish appropriate procedures.[13] At least one court has independently fashioned guidelines where

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on living will legislation) [hereinafter cited as LEGAL AND ETHICAL ASPECTS]; Van Scoy-Mosher, *An Oncologist's Case for No-Code Orders, id.* at 14, 17 (discussing drafting of guidelines for writing order not to resuscitate); Relman, *The* Saikewicz *Decision: A Medical Viewpoint*, 4 AM. J.L. & MED. 233, 242 (1978)(stating that physicians should seek legislative protection for defense in *Saikewicz*-type cases) [hereinafter cited as *A Medical Viewpoint*]. *But cf.* Relman, *The* Saikewicz *Decision: Judges as Physicians*, 298 N.E.J. MED. 508, 509 (1978)(legislation should not impose on decision-making process of physician).

[10] *See, e.g.*, United States v. University Hosp., 575 F. Supp. 607, 609 (E.D.N.Y. 1983)(suit by government to compel medical records for seriously ill newborn), *aff'd*, 729 F.2d 144 (2d Cir. 1984); Weber v. Stony Brook Hosp., 60 N.Y.2d 208, 456 N.E.2d 1186, 1188, 469 N.Y.S.2d 63, 65 (suit by "stranger" to compel treatment of seriously ill newborn), *cert. denied*, 104 S. Ct. 560 (1983).

[11] *See, e.g.*, Oakes, *A Prosecutor's View of Treatment Decisions*, in LEGAL AND ETHICAL ASPECTS, *supra* note 9, at 194, 199 (withdrawal of life support could subject physicians to criminal liability); Robertson, *Legal Aspects of Withholding Medical Treatment from Handicapped Children, id.* at 213, 217-18 (liability of attending physician regarding defective newborns); Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STAN. L. REV. 213, 224-35 (1975)(discussing criminal liability of physicians and hospitals that refuse ordinary lifesaving medical care for defective infants) [hereinafter cited as *Defective Newborns*]. *But cf.* Ginex, *A Prosecutor's View on Criminal Liability for Withholding Medical Care: The Myth and the Reality*, in LEGAL AND ETHICAL ASPECTS, *supra* note 9, at 205, 208-09 (noting that in rare instances where physician is charged, numerous obstacles remain for prosecution).

[12] *See, e.g., A Medical Viewpoint, supra* note 9, at 238-42 (discussing exemplary cases with distressing solutions, concluding that better alternative is consultation). *See also* COMMISSION REPORT, *supra* note 1, at 43-51 (discussing collaboration between patient and health care provider as essential to good decision-making).

[13] *See, e.g.*, Severns v. Wilmington Medical Center, 421 A.2d 1334, 1346 (Del. 1980)(inviting "prompt attention" of legislature to enact state policy governing these matters); Satz v. Perlmutter, 379 So. 2d 359, 360 (Fla. 1980)(stating that this type issue is more suitably addressed in legislative forum); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1221 (1985)(noting absence of legislation on this topic); *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 74 (1981)(emphasizing that enlargement of role of courts in these situations, if desirable, should be made by legislature); *In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738, 752 (1983)(inviting legislature to address this "sensitive" issue).

the state legislature failed to act expeditiously,[14] and other courts have provided elaborate procedures for the exercise of a comatose patient's right to refuse treatment.[15] These courts, however, have been criticized for usurping the legislatures' proper function.[16]

With the passage of its Natural Death Act, codified in sections 41-41-101 to -121 of the Mississippi Code,[17] Mississippi has joined the trend toward legislative recognition of a right to refuse medical treatment. This article offers a brief review of natural death acts from other jurisdictions and some of the problems raised by those statutes.[18] It then examines patients' rights to refuse medical treatment in Mississippi. Although this article focuses on Mississippi's Natural Death Act,[19] the provisions of the Act are not the only source of law governing medical treatment

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[14] In Satz v. Perlmutter, 379 So. 2d 359, 360 (Fla. 1980), the Florida Supreme Court expressly deferred to the power of the state legislature to establish guidelines, stating "It is the type issue which is more suitably addressed in the legislative forum, where fact finding can be less confined and the viewpoints of all interested institutions and disciplines can be presented and synthesized." Four years later, after the Florida legislature failed to respond to this plea for guidance, the court took the initiative and set up procedures for patients and their families to assert their right to resist treatment. *See* John F. Kennedy Hosp. v. Bludworth, 352 So. 2d 921, 926 (Fla. 1984)(court used doctrine of "substituted judgment"). The legislature did, in fact, adopt a natural death act in 1984. *See* Life Prolonging Procedure Act, ch. 84-58, 1984 Fla. Sess. Law Serv. 40 (West).

[15] *See, e.g.,* Eichner v. Dillon, 426 N.Y.S.2d 517, 550 (establishing procedure for withdrawal of extraordinary life-sustaining measures from terminally ill and comatose patient), *modified sub nom. In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, *cert. denied,* 454 U.S. 858 (1981); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 665-72 (discussing factors in determining whether life-support apparatus should be discontinued), *cert. denied,* 429 U.S. 922 (1976). Most recently, the New Jersey Supreme Court has created even more elaborate procedures when treatment is to be withdrawn from a patient confined to a nursing home. *See In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1229-35 (1985)(analysis of prerequisite evidence that must be present before treatment may be discontinued).

[16] *See, e.g., In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 67 (emphasizing that courts are not empowered to prescribe rules in matters such as these), *cert. denied,* 454 U.S. 858 (1981). *See also* Satz v. Perlmutter, 379 So. 2d 359, 360 (Fla. 1980)(recognizing that this type issue is more suitably addressed in legislative forum); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 432 n.18 (1977)(stating that formulation of guidelines applicable to medical emergencies involving incompetent persons is better left to legislature).

[17] *See* MISS. CODE ANN. §§ 41-41-101 to -121 (Supp. 1984)(withdrawal of life-saving mechanisms).

[18] *See infra* notes 23-89 and accompanying text.

[19] *See infra* notes 90-121 and accompanying text.

decisions in Mississippi. The Act must be read in conjunction with Mississippi's long-standing Medical Consent Act[20] and with emerging constitutional principles. The article also reviews some recurring problems that face patients, health care providers, and courts, and analyzes how those issues might be resolved in Mississippi. It concludes that Mississippi's Natural Death Act has failed to avoid some of the pitfalls of earlier legislation and will not resolve the most frequent and difficult cases because the Act is too narrow in its scope.[21] Finally, it concludes that the Act is uncertain in several important ways.[22]

II. A Review of Natural Death Acts

The California legislature enacted the first natural death act[23] in 1976,[24] partially in response to *In re Quinlan*,[25] in which discontinuance of extraordinary treatment was sought for a twenty-one year old woman in a persistent vegetative state. Subsequently, thirty-five states and the District of Columbia have enacted natural death acts.[26] This section reviews several of

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[20] Miss. Code Ann. § 41-41-3 (Supp. 1984).

[21] *See infra* notes 134-256 and accompanying text.

[22] *See infra* notes 257-309 and accompanying text.

[23] *See* Cal. Health & Safety Code §§ 7185-7195 (West Supp. 1985)(Natural Death Act).

[24] *See* Commission Report, *supra* note 1, at 143 (discussing California's Natural Death Act).

[25] 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

[26] As of 1983, thirteen states and the District of Columbia had enacted natural death acts. These states included Alabama, Arkansas, California, Delaware, Idaho, Kansas, Nevada, New Mexico, North Carolina, Oregon, Texas, Vermont, and Washington. *See* Commission Report, *supra* note 1, at 141, 318-87 (Appendix D)(providing natural death statutes of each state as of 1983). Since 1983, twenty-two additional states have enacted natural death statutes: Florida, Life Prolonging Procedure Act, ch. 84-58, 1984 Fla. Sess. Law Serv. 40 (West); Georgia, Ga. Code Ann. §§ 31-32-1 to -12 (Supp. 1984); Illinois, Illinois Living Will Act, Ill. Ann. Stat. ch. 110½, §§ 701-709 (Smith-Hurd Supp. 1985); Iowa, Life-Sustaining Procedures, 1985 Iowa Legis. Serv. No. 1 (West); Louisiana, Declarations Concerning Life-Sustaining Procedures, 1985 La. Sess. Law Serv. Act No. 187 (West)(to be codified at La. Rev. Stat. Ann. §§ 40:1299.58.1-.58.8); Maryland, Md. Health-Gen. Code Ann. §§ 5-601 to -614 (Supp. 1985); Mississippi, Miss. Code Ann. §§ 41-41-101 to -121 (Supp. 1984); Virginia, Va. Code § 54-325:8.1-8.13 (Supp. 1984); West Virginia, W. Va. Code §§ 16-30-1 to -10 (Supp. 1984); Wisconsin, Wis. Stat. Ann. § 154.01-.15 (West Supp. 1984); and Wyoming, Wyo. Stat. §§ 33-26-144 to -151 (Supp. 1984). As this issue went to press, Arizona, Colorado, Connecticut, Indiana, Maine, Missouri, Montana, New Hampshire, Oklahoma, Tennessee, and Utah had also recently en-

those acts and discusses some of their shortcomings.

The California Natural Death Act was passed amidst considerable political controversy, perhaps explaining some of its inadequacies.[27] A declarant must use the standard form in the Act, which provides that if death is imminent, life-sustaining procedures should be withheld or removed.[28] The directive must be reexecuted every five years.[29] It is legally binding only if it has been executed or reexecuted at least fourteen days after the patient has been diagnosed as terminally ill.[30] If executed prior to the fourteen-day waiting period, the directive is probative of a patient's desire, but is only one factor for the physician to consider.[31] Even if all conditions are met, a physician may refuse to comply with the directive if he transfers the patient to another physician.[32] The Act makes no provision for cases in which an incompetent patient has made no directive.

Criticisms of the California Act are several. The Act sets up unreasonable obstacles to the exercise of a patient's right to refuse treatment. Advocates of the right to refuse treatment contend that our society recognizes a fundamental right of self-determination,[33] reflected in common-law doctrines like informed consent[34] and in the constitutional right to privacy.[35] The fourteen-day waiting period is a form of unjustified medical pater-

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acted living will legislation. Concern for Dying Newsletter, Summer 1985, at 2.

[27] Rosoff, *Living Wills and Natural Death Acts*, in LEGAL AND ETHICAL ASPECTS, *supra* note 9, at 186, 190.

[28] CAL. HEALTH & SAFETY CODE § 7188.

[29] *Id.* § 7189.5.

[30] *Id.* § 7188.

[31] *Id.* § 7191(c).

[32] *Id.* § 7191(b).

[33] *See, e.g.*, CONCERN FOR DYING, A LEGAL GUIDE TO THE LIVING WILL 4 (1979)(rights of competent patients). *See also* COMMISSION REPORT, *supra* note 1, at 43 (discussing patient's interest in self-determination).

[34] *See, e.g.*, Mohr v. Williams, 95 Minn. 516, 104 N.W. 12, 16 (1905)(operation performed without plaintiff's consent unlawful); Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92, 93 (1914)(stating that every human being has right to determine what shall be done with his own body).

[35] *See, e.g., In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 662-64 (discussing vegetative patient's constitutional right of privacy), *cert. denied*, 429 U.S. 922 (1976). Interestingly, the California legislature drafted its narrow statute despite an express state constitutional right to privacy. *See* CAL. CONST. art. 1, § 1 (recognition of privacy as an inalienable right).

nalism,[36] suggesting that a competent adult not yet critically ill cannot decide his own fate.[37] A related problem with the fourteen-day waiting period is that, as a practical matter, it will often defeat the right recognized by the statute. Patients frequently die within fourteen days after the diagnosis of terminal illness. Under the California Act, those patients are forced to end their lives accepting unwanted treatment. Alternatively, patients may become incompetent during the waiting period, and thereby become disqualified to assert their desires.[38] This problem has been ameliorated, however, by California's recent expansion of its Durable Power of Attorney statute to cover health care decisions.[39] Those provisions, in effect, allow a person to appoint in advance an agent to make medical decisions on his behalf should he later become incompetent. That addition should also correct another failing of the California Natural Death Act in that the Act provides an obligatory standard form.[40] Such a form is easy to use without giving serious thought to the problem at hand. The language, however, may be ambiguous or overly general, requiring interpretation by others and in effect substituting their judgment for that of the patient. The right to refuse treatment is grounded on notions of individualism; standard forms paint with a broad brush, treating as of one mind all

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[36] For a critique of medical paternalism, see J. CHILDRESS, WHO SHOULD DECIDE? 162-85 (1982)(discussion of refusal of lifesaving medical treatment, decision-making for incompetent patients, active euthanasia, and assisted suicide).

[37] *Cf.* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)(holding that Akron ordinance prohibiting physician from performing abortion until 24 hours after pregnant woman signed consent form impermissibly burdened woman's constitutional right of privacy).

[38] COMMISSION REPORT, *supra* note 1, at 142, offers the following criticism of California's waiting period:

> A patient must wait 14 days after being told of the diagnosis before he or she can sign a directive, which would require a miraculous cure, a misdiagnosis, or a very loose interpretation of the word "imminent" in order for the directive to be of any use to a patient . . . . [A] study of California physicians one year after the new law was enacted found that only about half the patients diagnosed as terminally ill even remain conscious for 14 days.

Id.

[39] *See* CAL. CIV. CODE §§ 2430-2443 (West Supp. 1985)(legislative authorization giving attorney power to make health care decision for principal).

[40] CAL. HEALTH & SAFETY CODE § 7188.

patients who want to refuse some treatment.[41]

An additional problem is that the California Act is silent on the most frequently recurring situation: a patient has not prepared an advance directive and is now incompetent.[42] In these circumstances[43] the statute is irrelevant, except perhaps as a statement of public policy that California recognizes a right to refuse treatment. The Act does not establish a procedure for such cases, and this is the area in which courts have most frequently requested legislative action.[44]

Despite its infirmities, the California Act became a model for several other states,[45] with some limited modifications. For example, in 1977 both Texas and Oregon enacted laws largely tracking the California Act.[46] Both of these statutes have been amended to avoid some of the pitfalls of the California Act. The Texas Act was amended in 1979. The amendments abolished requirements that the directive must be reexecuted every five years and that it was not binding until fourteen days after a diagnosis of a terminal illness.[47] More recently, the Oregon legisla-

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[41] *See generally* COMMISSION REPORT, *supra* note 1, at 136-53 (discussing various forms and aspects of advance directives).

[42] Rosoff, *supra* note 27, at 191.

[43] *See, e.g., Quinlan,* 355 A.2d at 654-55 (21-year old woman entered persistent, vegetative coma).

[44] *See, e.g.,* Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484, 486 (1983)(stating that this issue had not been adequately addressed by legislature); Severns v. Wilmington Medical Center, 421 A.2d 1334, 1346 (Del. 1980)(inviting legislature to enact comprehensive policy governing these matters); *In re* P.V.W., 424 So. 2d 1015, 1019 (La. 1982)(noting that legislature had not established procedure for parents of incompetent person to withdraw life-support systems when person entered permanent and irrevocable comatose condition); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1221 (1985)(legislature had not enacted procedures for these situations). *See also In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 660 (quoting amicus brief statement that courts and legislative bodies may simply need to recognize present medical standards and practices), *cert. denied,* 429 U.S. 922 (1976).

[45] *See, e.g.,* IDAHO CODE §§ 39-4501 to -4508 (Supp. 1984)(Natural Death Act); NEV. REV. STAT. §§ 449.540 -.690 (1983)(withholding or withdrawal of life sustaining procedures); OR. REV. STAT. §§ 97.050 -.090 (1983)(rights with respect to terminal illness); TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1985)(Natural Death Act); WASH. REV. CODE ANN. §§ 70.122.010-.122.905 (Supp. 1985)(Natural Death Act).

[46] *See* OR. REV. STAT. §§ 97.050-.090 (1983)(rights with respect to terminal illness); TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1985)(Natural Death Act).

[47] TEX. REV. CIV. STAT. ANN. art. 4590h.

ture enacted similar amendments to its Natural Death Act.[48]

Several states have adopted natural death acts without reliance on the California Act.[49] Under the North Carolina statute,[50] the provisions of a directive are triggered when two physicians determine that a patient's condition is "terminal" and "incurable."[51] A patient may execute a living will at any time, and while the statute contains a model form, strict adherence is not required.[52] The "will," however, is subject to interpretation by the treating physician and no penalties are provided for a physician who ignores the declaration.[53] Another important innovation is that the North Carolina Act includes procedures for withdrawal of treatment from an incompetent patient who has not executed an advance directive. A family member may request that extraordinary treatment be withheld or withdrawn from an unconscious person with "no reasonable possibility" of returning to a "cognitive sapient state." Treatment can be terminated only if the condition is "terminal," "incurable," and "irreversible," as determined by the attending physician and confirmed in writing by a second physician.[54] Further, the statute allows withdrawal only of treatment considered "extraordinary means," which is defined as treatment that "would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function."[55]

As indicated, the North Carolina Act avoids some of the pitfalls of the California Act. Nonetheless, it has some weaknesses, such as granting virtually unfettered discretion to the physician.

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[48] *See* OR. REV. STAT. § 97.055(6)(eliminating reexecution provisions); § 97.075 (section requiring 14-day waiting period repealed).

[49] *See, e.g.*, ARK. STAT. ANN. §§ 82-3801 to -3804 (Supp. 1983)(death with dignity); N.M. STAT. ANN. §§ 24-7-1 to -11 (1978 & Supp. 1984)(Right to Die Act); N.C. GEN. STAT. §§ 90-320 to -322 (Supps. 1981 & 1983)(right to natural death; brain death).

[50] N.C. GEN. STAT. §§ 90-320 to -322 (Supps. 1981 & 1983).

[51] *Id.* § 90-321(b).

[52] *Id.* § 90-321(d).

[53] *Id.* § 90-321(c).

[54] *Id.* § 90-322 (Supp. 1983). Prior to the 1983 amendment, determination of the patient's condition was to be established by a majority of three physicians, including the attending physician. *Id.* § 90-322(a)(2)(Supp. 1981). The Act does not specify that it applies only to adults, thus leaving open the use of these procedures for seriously ill newborns and other minors.

[55] *Id.* § 90-321(a)(2).

For example, the Act states that "[t]he attending physician *may* rely upon a signed, witnessed, dated and proved declaration . . . ."[56] The Act provides no penalty for a physician who refuses to comply with a properly executed declaration. Additionally, it does not require a physician to transfer a patient if the attending physician refuses to comply with the declaration. Further, the Act gives unreviewed discretion to an attending physician of a terminally ill incompetent patient who has no spouse, guardian, or relative of the first degree.[57]

Some advocates of the right to die considered many of the early statutes unnecessarily restrictive and inconsistent with the constitutional status of the asserted right.[58] After nine states had enacted natural death laws, the Society for the Right to Die recruited students involved in the Yale Law School Legislative Services program to draft an act which would avoid these shortcomings. The proposal which resulted was substantially enacted by the state of Kansas in 1979.[59] Unlike the California statute, the Kansas Act[60] permits a person to prepare an advance declaration at any time.[61] Subsequent incompetence does not invalidate that declaration; consequently, no waiting period is required after a diagnosis of terminal illness.[62] A patient need not be informed that a condition is terminal. Along with about half of the other states having natural death acts, Kansas nullifies a directive if the patient is pregnant.[63] Revocation is made extremely easy.[64] Additionally, punishment is provided for (1) a physician who refuses to comply with a declaration if he also

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[56] *Id.* § 90-321(c)(emphasis added).

[57] *Id.* § 90-322(b). Section 90-322 provides guidelines for an attending physician to allow a patient to die a natural death in the absence of a declaration. The physician must have the approval of the patient's spouse or guardian or a majority of the relatives of the first degree, if they are available. *Id.*

[58] *See infra* notes 149-172 and accompanying text.

[59] *Rosoff, supra* note 27, at 190-91.

[60] KAN. STAT. ANN. §§ 65-28,101 to -28,109 (1980).

[61] *Id.* § 65-28,101.

[62] *Id.* § 65-28,106.

[63] *Id.* § 65-28,103(a).

[64] *See id.* § 65-28,104. A declaration may be revoked in writing, by oral expression of intent to revoke, or by implication as evidenced by the destruction or deterioration of the declaration. *Id.*

refuses to transfer the patient;[65] (2) a person who hastens another's death by falsifying a declaration or concealing its revocation;[66] (3) a person who prolongs the life of another against his will by concealing a declaration or by falsifying a revocation.[67]

Despite the input of advocates of natural death, the Kansas Act is less than perfect. While it requires that a condition be terminal before a declaration becomes operative, it fails to define that term, leaving open the question whether death must also be imminent.[68] As discussed below, that question has arisen frequently in litigated cases.[69] Equally important is the failure of the Act to provide for procedures in the case of an incompetent patient who has failed to execute a declaration when competent or who has never been competent.[70]

More recently, Delaware enacted a bill[71] which includes a significant innovation. Most acts contemplate a form, either prescribed[72] or suggested,[73] that specifies unwanted therapies.[74] Delaware allows a similar directive to be prepared,[75] but also recognizes the right of a competent person to appoint an agent to act as a surrogate decisionmaker if the declarant becomes incompetent.[76]

Despite the identifiable weaknesses of some of the earlier statutes, including the Model Act, some states have adopted

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[65] *Id.* § 65-28,107(a).

[66] *Id.* § 65-28,107(c).

[67] *Id.* § 65-28,107(b).

[68] *See id.* § 65-28,102 (omitting statutory definition of terminal illness).

[69] *See infra* notes 288-309 and accompanying text.

[70] *See infra* notes 229-56 and accompanying text.

[71] DEL. CODE ANN. tit. 16 §§ 2501-2509 (1983)(§ 2509 repealed in 1983).

[72] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7188 (providing that directive shall be in form provided by statute).

[73] *See, e.g.*, KAN. STAT. ANN. § 65-28,103(c)(providing form declaration but allowing inclusion of "other specific directions").

[74] Typically, the form declaration provides that "life-sustaining procedures" are to be withdrawn under certain conditions. *See, e.g.*, Medical Treatment Decision Act (Model Bill) § 3, *reprinted in* COMMISSION REPORT, *supra* note 1, at 314-15 (authorizing removal of life-sustaining devices where such devices serve only artificially to prolong dying process).

[75] *See* DEL. CODE ANN. tit. 16 §§ 2502(a), 2503(a)(recognizing patient's right to make written directive refusing medical or surgical treatment).

[76] *Id.* § 2502(b). This provision has been characterized as avoiding "serious shortcomings" of natural death acts in other states. COMMISSION REPORT, *supra* note 1, at 145.

those statutes largely unchanged.[77] Other states have borrowed heavily from those acts, but have grafted on additional provisions. The recently enacted Louisiana statute is illustrative.[78] Several sections of the Louisiana Act track the Model Act and acts derived therefrom. For example, the Louisiana Act's preamble and definitions are largely modeled on those sources,[79] as are its proposed declaration,[80] its provisions for revocation,[81] and its provisions governing the legal effect of the patient's death on insurance coverage.[82] The Louisiana Act, however, provides specifically that a declarant may alter the proposed form by inclusion of "specific directions including but not limited to a designation of another person to make the treatment decision for the declarant . . . ."[83] It also makes severable valid and invalid directives.[84]

Louisiana also provides detailed procedures concerning the terminally ill incompetent patient who has failed to make a declaration. Specifically, upon a diagnosis of terminal and irreversible illness,[85] treatment may be terminated if there is agreement

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[77] *See, e.g.*, ALA. CODE §§ 22-8A-1 to -10 (1984)(Natural Death Act, substantially similar to Medical Treatment Decision Act [Model Bill]).

[78] Declarations Concerning Life-Sustaining Procedures, 1985 La. Sess. Law Serv. Act No. 187 (West)(to be codified at LA. REV. STAT. ANN. §§ 40:1299.58.1-.58.8).

[79] *Compare id.* § 40:1299.58.1 *with* Medical Treatment Decision Act [Model Bill] § 1, *reprinted in* COMMISSION REPORT, *supra* note 1, at 313, *and* KAN. STAT. ANN. § 65-28,101 (substantial similarities among these provisions).

[80] *Compare* Declarations Concerning Life-Sustaining Procedures, 1985 La. Sess. Law Serv. Act No. 187 (West)(to be codified at LA. REV. STAT. ANN. § 40:1299.58.3(C)(1)) *with* Medical Treatment Decision Act [Model Bill] § 3, *reprinted in* COMMISSION REPORT, *supra* note 1, at 314-15; ALA. CODE § 22-8A-4(c)(1984); *and* KAN. STAT. ANN. § 65-28,103(c)(discussing form of directive).

[81] *Compare* Declarations Concerning Life-Sustaining Procedures, 1985 La. Sess. Law Serv. Act No. 187 (West)(to be codified at LA. REV. STAT. ANN. § 40:1299.58.4) *with* Medical Treatment Decision Act [Model Bill] § 4, *reprinted in* COMMISSION REPORT, *supra* note 1, at 314-15; ALA. CODE § 22-8A-5 (1984); *and* KAN. STAT. ANN. § 65-28,104 (providing for revocation of declaration).

[82] *Compare* LA. REV. STAT. ANN. § 40:1299.58.10(B)(2)(West Supp. 1985) *with* Medical Treatment Decision Act [Model Bill] § 8(b), (c), *reprinted in* COMMISSION REPORT, *supra* note 1, at 316-17; ALA. CODE § 22-8A-9 (1984); *and* KAN. STAT. ANN. § 65-28,108(b), (c)(discussing effect of declaration on insurance policies and coverage).

[83] Declarations Concerning Life-Sustaining Procedures, 1985 La. Sess. Law Serv. Act No. 187 (West)(to be codified at LA. REV. STAT. ANN. § 40:1299.58.3(C)(1)).

[84] *Id.* § 40:1299.58.3(C)(2).

[85] *Id.* § 40:1299.58.2(7) defines a "qualified patient"—that is, a patient from whom

between the attending physician and specified surrogate decisionmaker.[86] Also innovative, but more controversial, the Act includes procedures to govern withdrawal of life-support systems from terminally and irreversibly ill minors.[87] These procedures are controversial because under no circumstances is a mature minor allowed to make a decision for himself.[88] This may conflict with the Supreme Court's analysis in the abortion context where mature minors have a right to privacy virtually coterminous with that of an adult, not subject to veto by a third party.[89]

A review of natural death acts from other jurisdictions indicates that generally legislatures have been responsive to problems in predecessor acts. The perfect act has yet to be drafted, but recent statutes have been innovative, for example, in developing procedures for incompetents without advance directives and in encouraging appointment of a surrogate as an alternative to specifying unwanted treatment.

III. Mississippi's Natural Death Act

Mississippi's Natural Death Act was intended to authorize "withdrawal of life-sustaining mechanisms" under certain carefully circumscribed conditions.[90] This section reviews the provisions of the Act.

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treatment may be withdrawn—as a person suffering from a "terminal and irreversible condition." The requirement of irreversibility is redundant because, as the Act was originally introduced, a "terminal condition" was "a condition . . . which, regardless of the application of life-sustaining procedures, would, within reasonable medical judgment, produce death and serve only to postpone the moment of the death of the patient." H.B. 996, La. Reg. Sess., 1983. Thus a terminal condition is already an irreversible one because death will follow even with treatment. *See id.* (death must be imminent).

[86] Declarations Concerning Life-Sustaining Procedures, 1985 La. Sess. Law Serv. Act No. 187 (West)(to be codified at La. Rev. Stat. Ann. § 40:1299.58.5).

[87] *Id.* § 40:1299.58.6.

[88] *Id.* The minor's parent, guardian, or spouse may execute the declaration on behalf of the minor. The spouse must have reached the age of majority. *Id.*

[89] *See* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 442 (1983)(statute requiring parental consent to abortion for all minor pregnant women under 15 held unconstitutional); Bellotti v. Baird, 443 U.S. 622, 647-48 (1979)(plurality opinion by Powell, J.)(state requiring pregnant minor to obtain parental consent to abortion must provide alternative procedure allowing authorization of abortion; pregnant minor entitled to prove maturity or that abortion would be in her best interests).

[90] Miss. Code Ann. § 41-41-101.

Under the Act, a person may execute a declaration if he wants to authorize the withdrawal of life-sustaining mechanisms. Section 41-41-107(1) provides a standard form of that declaration.[91] Several requirements must be met for a form to be binding. A person must be mentally competent and at least eighteen years old when he executes a declaration.[92] The person apparently may execute the document at any time, not only after learning that he is terminally ill. The declarant must sign the instrument in the presence of at least two witnesses,[93] who attest not only to the genuineness of the signature, but also to the declarant's competence.[94] A witness must know the declarant;[95] however, a witness cannot be related to the declarant,[96] stand to benefit from the person's estate,[97] be an attending physician, or be an employee of the physician or of the health care facility treating the patient.[98]

Section 41-41-107 contains two requirements that will limit the utility of the Act. First, a declarant must "substantially" follow the prescribed form.[99] Second, a declaration is valid only if filed with the Bureau of Vital Statistics of the State Board of Health.[100] The sections covering the standard form[101] and withdrawal of treatment[102] also narrow the right to refuse medical treatment. Only if the person has executed a declaration and certain conditions are met can he insist that he be withdrawn from "life-sustaining mechanisms."[103] Those mechanisms are defined as "extraordinary techniques and applications, including mechanical devices, which prolong life through artificial

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[91] *Id.* § 41-41-107(1).

[92] *Id.* § 41-41-105.

[93] *Id.* § 41-41-107, 111.

[94] *Id.* § 41-41-107(1). This is the preferred role of witnesses. *See* COMMISSION REPORT, *supra* note 1, at 149 (stating that some way should be established to demonstrate declarant's legal competence at execution of directive).

[95] MISS. CODE ANN. § 41-41-107(1).

[96] *Id.* § 41-41-107(1), 111.

[97] *Id.* § 41-41-111.

[98] *Id.*

[99] *Id.* § 41-41-107(1).

[100] *Id.* § 41-41-107(2).

[101] *Id.* § 41-41-107(1).

[102] *Id.* § 41-41-113.

[103] *Id.*

means."[104] Before the declaration can be honored, the declarant must have become terminally ill and be unconscious or suffering "severe distress."[105] The diagnosis of terminal illness must be made by the declarant's physician and confirmed by at least two other physicians. The physicians must also confirm that the patient cannot regain a meaningful state of health and that death is imminent absent the use of life-sustaining mechanisms.[106] The Act specifically disclaims authorizing mercy killing by act or omission.[107]

Special provisions apply if the terminally ill person is pregnant. Her declaration cannot be honored during the pregnancy. The Act makes no distinction between early and late pregnancies. Although not entirely clear, the Act apparently requires a pregnant but terminally ill woman to carry her fetus to term.[108]

Section 41-41-109 provides that a declarant may revoke his declaration. Similar to section 41-41-107, it requires a declarant to follow substantially a standard form which states quite simply that he "revoke[s] the declaration" previously made.[109] Section 41-41-109 contains the same requirements concerning witnesses as does section 41-41-107,[110] and the revocation must also be filed with the Board of Health.[111] There are instances, however, when a declarant may revoke a declaration without adherence to the foregoing formalities. Subsection 41-41-109(3) allows a declarant "unable physically to execute a revocation" formally to do so by any clear expression, "oral or otherwise."[112] Subsection

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[104] *Id.* § 41-41-103.

[105] *Id.* § 41-41-113.

[106] *Id.*

[107] *Id.* § 41-41-117(2).

[108] *Id.* § 41-41-107(1). It would appear that a woman has no choice under the Act to provide otherwise because that section states that a declarant must "substantially" follow that form. *Id.*

[109] *Id.* § 41-41-109(1).

[110] *Id.* § 41-41-111.

[111] *Id.* § 41-41-109(2).

[112] *Id.* § 41-41-109(3). The Act provides no procedure to guarantee that the declarant has made a *bona fide* revocation. For example, there is no requirement that there be witnesses other than the person to whom the revocation is made. *Id.* Further, no penalties are provided where a person forges a revocation. *See infra* notes 120-21 and accompanying text.

41-41-109(4) permits the attending physician to ask the declarant whether he revokes his declaration if the physician knows or has "reason to believe" that a declaration has been made and if the physician is about to perform "procedures which might reasonably be expected to cause the declarant to become permanently unconscious or unable to make his wishes known . . . ." In the latter case, the physician determines whether the declaration has been revoked.[113]

Sections 41-41-115 and 41-41-117 clarify the extent of a physician's duty in participating in the withdrawal of life-sustaining mechanisms. A determination that a declaration has been made is a precondition to withdrawal of treatment under section 41-41-115. The physician must contact the Board of Health for "a certified copy of the declaration and a certificate that no revocation has been filed . . . ."[114] The Act does not *require* health care providers to withdraw treatment from the patient; however, the noncomplying provider has a duty to cooperate with efforts to transfer the patient to a physician or facility that will withdraw treatment.[115] Section 41-41-117 provides a complying physician with a good faith defense to criminal or civil proceedings. It also provides, in effect, that good faith compliance with a declaration cannot be construed as unprofessional conduct.[116]

Section 41-41-119 governs the patient's relationship to his insurers. Withdrawal of life-sustaining treatment is not suicide, according to the Act,[117] and may not, therefore, affect terms of life insurance policies.[118] Similarly, health insurers cannot require a person to consent to have treatment withdrawn as a condition for coverage.[119]

Finally, section 41-41-121 provides for sanctions. A person who hastens a patient's death by forging or coercing a declaration or concealing the existence of a revocation "shall be guilty"

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[113] *Id.* § 41-41-109(4).
[114] *Id.* § 41-41-115(1).
[115] *Id.* § 41-41-115(2).
[116] *Id.* § 41-41-117(1).
[117] *Id.* § 41-41-119(1).
[118] *Id.* § 41-41-119(2), (3).
[118] *Id.* § 41-41-119(4).

of a felony. A person convicted of that offense "shall be sentenced to the custody of the Department of Corrections for not more than twenty (20) years."[120] No crime or punishment is provided for a person who keeps a person alive against his will by forging or coercing a revocation of a declaration.[121]

IV. A Critique of Mississippi's Natural Death Act

Several aspects of Mississippi's Natural Death Act are noteworthy. Although this section discusses some of the strengths of the Act, it is primarily devoted to a critical analysis of the Act and several serious shortcomings of the law, both from a public policy and a constitutional viewpoint.

A. Strengths of the Act

Mississippi's Natural Death Act avoids some of the failings of earlier legislation. For example, the Act permits a person to execute a declaration at any time. Section 41-41-105 requires only that a person be at least eighteen years old when he executes the document.[122] Further, a patient does not have to be aware of his terminal condition to make the declaration operative.[123] The only requirement of notice to the patient is contained in section 41-41-109(4). That section provides, in effect, that if the physician has reason to know that a patient has executed a declaration, and if he is about to perform procedures which "might reasonably be expected to" render the patient unable to communicate, the physician *may* ask the patient whether he revokes his declaration.[124] Notice is thus never mandatory.

The Act carefully limits who may serve as a witness. As with other acts,[125] Mississippi's Natural Death Act prevents a person from serving as a witness if he has a conflict of interest. The

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[120] *Id.* § 41-41-121.

[121] *Id.*

[122] *Id.* § 41-41-105.

[123] *Id.* § 41-41-113 (declaration may be operative if patient suffers "severe distress" or unconsciousness as result of terminal condition).

[124] *Id.* § 41-41-109(4).

[125] *See, e.g.*, N.C. Gen. Stat. § 90-321(c)(3)(witnesses must state that they do not have conflict of interest).

conflict may arise in two different ways. The Act obviously prevents a witness from having a financial interest in bringing about a swifter death for the patient.[126] On the other hand, while a patient may wish to forego life-sustaining treatment, his family members often desire to prolong his life because of their own personal needs.[127] The Act thus also prohibits family members from witnessing either a declaration or a revocation.[128] Finally, the Act prohibits attending physicians, their employees, and employees of the health care facility where the patient is located from serving as witnesses.[129]

The Act protects both the health care provider and the patient if the provider resists withdrawal of treatment. Physicians do not agree on how heroic dying patients ought to be. Some would like to see the patient endure as long as possible if only so that the physician may learn more about the particular disease.[130] While the physician is entrusted with some unreviewed discretion,[131] the physician whose principles dictate against withdrawal of treatment has a duty to transfer the patient.[132] Thus, he is not forced to choose between his own principles and his patient's right of self-determination. The Act also establishes a good faith immunity for the complying physician,[133] thereby alleviating fear of criminal and civil suit.

B. Weaknesses of the Act

Several criticisms may be levelled against Mississippi's Nat-

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[126] MISS. CODE ANN. § 41-41-111(b), (d).

[127] *See* COMMISSION REPORT, *supra* note 1, at 47-48 (discussing family response to impending death).

[128] MISS. CODE ANN. § 41-41-111(a).

[128] MISS. CODE ANN. § 41-41-111(c).

[130] *See, e.g.*, Karnofski, *Why Prolong the Life of a Patient with Advanced Cancer?*, 10 CA, Jan.-Feb. 1960, at 10 (urging patients to fight until overcome by death). *See also* Y. Kamisar, *A Life Not (Or No Longer) Worth Living: Are We Deciding the Issue Without Facing It?* 8-12 (Nov. 10, 1977)(Mitchell Lecture delivered at the State University of New York at Buffalo).

[131] *See, e.g.*, MISS. CODE ANN. § 41-41-109(4). An attending physician who believes that a patient has executed a declaration may question the patient as to whether he wishes to revoke his declaration. The physician's determination as to the patient's answer is final. *Id.*

[132] *Id.* § 41-41-115(2).

[133] *Id.* § 41-41-117(1).

ural Death Act. First, since it is unclear whether the Act was intended to serve as the exclusive vehicle for assertion of the right to die, it provides no guidance in a wide variety of situations where that right is asserted in a nonstatutory manner. Second, it appears that sections of the Act limiting the right to refuse treatment when the patient is pregnant may violate the United States Constitution. Third, in its use of a standard form, and in its failure to define key terms included therein, the Act deprives the patient of flexibility in asserting his wishes, and places an inordinate amount of discretion in the hands of the attending physician, who must interpret the ambiguous terms in the declaration. These problems will be the focus of the remainder of this section.

1. Nonstatutory Assertion of the Right to Die

Once enacted, a natural death statute may be viewed as a patient's exclusive remedy if medical treatment is unwanted; failure to follow the statutory guidelines may cause a patient's wishes regarding treatment to go unheeded.[134] Some drafters have attempted to preclude such a reading by stipulating in the act that patients have "a fundamental right to control the decisions relating to the rendering of their own medical care . . ."[135] and that "artificial prolongation of human life . . . may cause loss of individual and personal dignity . . . ."[136] Express recognition of the fundamental nature of a patient's right to resist treatment evidences a strong public policy in favor of rights beyond those recognized in the act. Some acts also provide that the legislatively-created right to prepare a declaration is cumulative with other rights of a patient.[137] This alerts the parties to addi-

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[134] *See, e.g.*, COMMISSION REPORT, *supra* note 1, at 144-45 ("natural death acts may restrict patients' ability to have their wishes about life-sustaining treatment respected").

[135] *See, e.g.*, ALA. CODE § 22-8A-2 (1975)(discussing fundamental right of adults to control medical decisions); KAN. STAT. ANN. § 65-28,101 (same).

[136] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7186 (discussing artificial prolongation of life); Declarations Concerning Life-Sustaining Procedures, 1985 La. Sess. Law Serv. Act No. 187 (West)(to be codified at LA. REV. STAT. ANN. § 40:1299.58.1(B))(same).

[137] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7193 (stating that Act does not supersede other legal rights or responsibilities individual has in withdrawing life-support system); LA. REV. STAT. ANN. § 40:1299.58.10(C)(stating that Act is cumulative with existing rights of consent or nonconsent to surgical treatment).

tional statutory or constitutional rights.

Mississippi's Natural Death Act is silent on whether its provisions are exclusive or cumulative. This silence may create confusion in a number of situations. As discussed below,[138] the Mississippi Act applies in few situations which will face health care providers. Health care providers are far more likely to be faced either with conscious patients without declarations who resist treatment or with incompetent patients with noncomplying declarations or without declarations. Each situation is discussed in a succeeding subsection of this article.

(i) Competent Patients Without Declarations

Health care providers may be faced with competent patients who resist treatment in several contexts. A number of situations are worthy of discussion: for example, conscious patients near death, for whom treatment merely prolongs dying;[139] patients suffering life-threatening conditions, like gangrenous extremities, who resist treatment which may permit them to resume a sapient but impaired existence;[140] and patients suffering life-threatening conditions which may be reversed entirely, but who resist treatment on religious grounds.[141] For purposes of analysis, it is to be assumed that the patient has not complied with section 41-41-113 of Mississippi's Natural Death Act.[142] These cases present courts and health care providers with some of the most difficult moral dilemmas.[143] Due to the Act's silence as to

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[138] *See infra* notes 229-36 and accompanying text.

[139] *See, e.g.*, Satz v. Perlmutter, 362 So. 2d 160, 161 (Fla. Dist. Ct. App. 1978)(fully aware patient wishing respirator to be removed), *aff'd*, 379 So. 2d 359 (Fla. 1980).

[140] *See, e.g.*, Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232, 1233 (1978)(elderly widow refused to consent to amputation of her leg); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785, 786 (1978)(elderly patient refused to consent to amputation of both legs).

[141] *See, e.g., In re* President of Georgetown College, 331 F.2d 1000 (D.C. Cir.)(patient unwilling to consent to blood transfusion on religious grounds), *reh'g denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *In re* Osborne, 294 A.2d 372 (D.C. Cir. 1972)(same); *In re* Brooks' Estate, 32 Ill.2d 361, 205 N.E.2d 435 (1965)(same).

[142] *See* MISS. CODE ANN. § 41-41-113 (discussing requirements for withdrawal of life-sustaining mechanisms).

[143] *See* Cantor, *Quinlan, Privacy, and the Handling of Incompetent Dying Patients*, 30 RUTGERS L. REV. 243, 249-50 (1977)(comparing sanctity of life with patient's

the existence of additional rights, it must be observed from the outset that Mississippi's Natural Death Act is of no legal significance in resolving these cases.

As recognized by one court, "[t]he right of a person to control his own body is a basic societal concept, long recognized in the common law."[144] Early precedent was not on all fours with the situations posed above. That is, the cases did not involve refusal to submit to treatment. Instead, they centered on other issues, such as whether a physician committed a battery when he treated a patient without securing an informed consent[145] or whether a court could order a litigant to undergo a medical examination.[146] Some early cases contained strong dicta recognizing the individual's right of self-determination.[147] Courts sometimes balked at giving effect to that right, however, as in cases of Jehovah's Witnesses who resisted blood transfusions.[148]

Since the mid-1970's, courts have uniformly recognized a nonstatutory right to refuse medical treatment.[149] *Roe v.*

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choice to resist medical treatment).

[144] *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1221 (1985).

[145] *See, e.g.*, Mohr v. Williams, 95 Minn. 516, 104 N.W. 12, 16 (1905)(surgeon performing operation committed technical battery where operation was performed without patient's consent, even though surgery was successful); Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92, 93 (1914)(surgeon who performs operation without patient's consent commits assault and is liable for damages).

[146] *See, e.g.*, Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)(discussing an individual's right to control his person).

[147] *See, e.g., id.* at 251: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

[148] *See, e.g., In re* President of Georgetown College, 331 F.2d 1000, 1001-02 (D.C. Cir.)(order authorizing blood transfusions by hospital to nonconsenting Jehovah's Witness held proper), *reh'g denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670, 673 (1971)(holding that blood transfusion to Jehovah's Witness was proper and stating that there is no constitutional right to choose to die)(overruled in *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1224, regarding statement of constitutional right to die). *See generally* Paris, *Compulsory Medical Treatment and Religious Freedom: Whose Law Shall Prevail?*, 10 U.S.F.L. Rev. 1, 1 (1975)(contending that most court-ordered blood transfusions to Jehovah's Witnesses are not constitutionally sound when dealing with competent adult patients).

[149] *See, e.g.*, Severns v. Wilmington Medical Center, 421 A.2d 1334, 1345-47 (Del. 1980)(husband of comatose wife allowed to assert her right to privacy and apply for removal of her life-sustaining supports); John F. Kennedy Hosp. v. Bludworth, 452 So. 2d

Wade,[150] which recognized a woman's constitutional right to privacy encompassing the right to abort her fetus, gave impetus to courts finding in favor of a right to refuse medical treatment. Even before the widely publicized *Quinlan* case, a Pennsylvania common pleas court found, in reliance on *Roe*, that a competent patient has a right to refuse to submit to a mastectomy even though death might result from nontreatment.[151] *Quinlan* found a similar right despite the patient's incompetence to assert the right on her own behalf.[152] Following *Quinlan's* lead, every court but one faced with the issue has found the right to refuse medical treatment to be of constitutional origin.[153] The United States

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921, 923-24 (Fla. 1984)(terminally ill incompetent patient has same right to refuse treatment as terminally ill competent person); Satz v. Perlmutter, 362 So. 2d 160, 163-64 (Fla. Dist. Ct. App. 1978)(competent adult patient had right to refuse or discontinue treatment based on constitutional right of privacy), *aff'd*, 379 So. 2d 359 (Fla. 1980); *In re* Spring, 380 Mass. 629, 405 N.E.2d 115, 117 (1980)(request by wife and son of incompetent patient to terminate life-sustaining hemodialysis treatment); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 422 (1977)(stating that all persons, competent or incompetent, have right to refuse medical treatment in appropriate circumstances); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 664 (individual's right to privacy to discontinue life-support systems increases as prognosis of recovery dims), *cert. denied*, 429 U.S. 922 (1976); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785, 789 (1978)(state's interest in preservation of life inferior to patient's privacy right); *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 72, 438 N.Y.S.2d 266, 274 (guardian allowed to terminate respirator of incompetent patient who, prior to incompetency, had requested not to have his life prolonged), *cert. denied*, 454 U.S. 858 (1981); *In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738, 743 (1983)(allowing discontinuance of life-sustaining systems to incompetent patient in chronic vegetative state).

[150] 410 U.S. 113 (1973).

[151] *In re* Yetter, 62 Pa. D. & C.2d 619, 623-24 (C.P. Northampton County 1973)(*Roe* guaranteed competent adult right to die barring any substantial interest of state in protecting third parties).

[152] *Quinlan*, 355 A.2d at 664.

[153] *See, e.g.*, Severns v. Wilmington Medical Center, 421 A.2d 1334, 1347 (Del. 1980)(husband had standing to assert constitutional rights of comatose wife); Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978)(recognizing patient's right to refuse or discontinue treatment based on constitutional right of privacy), *aff'd*, 379 So. 2d 359 (Fla. 1980); Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232, 1233 (1978)(discussing constitutional right to privacy); Leach v. Akron Gen. Medical Center, 68 Ohio Misc. 1, 426 N.E.2d 809, 814 (C.P. 1980)(same); *In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738, 743 (1983)(stating that constitutional right of privacy of terminally ill adult encompasses right to refuse treatment that serves only to prolong dying process, absent countervailing state interests). The New York Court of Appeals found a right to refuse medical treatment, but based that right on the common law, allowing more room for the legislature to regulate the subject. *See In re* Storar, 52 N.Y.2d 363, 420 N.E.2d

Supreme Court, however, has not addressed this issue.[154] Therefore, state and lower federal courts are still free to reject a constitutional right to refuse medical treatment, although in light of almost unanimous support it is probable that the Supreme Court would recognize this right.

Another basis for the right to refuse medical treatment may be implied from the doctrine of informed consent. Mississippi has codified the common law of informed consent by passage of the Medical Consent Act,[155] which expressly recognizes an adult's right to consent to lawful medical procedures.[156] In addition, it allows an adult to consent on behalf of incompetent patients,[157] largely tracking the common law.[158] By implication, the statute recognizes a right to refuse treatment when the person acts as a surrogate.[159] Importantly, the statute recognizes that "nothing contained herein shall be construed to abridge any right of an adult . . . to *refuse* such consent as to his own person."[160]

Whatever the source of the right, however, the right to refuse treatment is not absolute. That right has been overridden when the state's interest is sufficiently compelling to outweigh the patient's interest. Four important state interests commonly cited by courts and commentators as limiting the right of a person to refuse medical treatment are "preserving life, preventing suicide, safeguarding the integrity of the medical profession, and

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64, 70, 438 N.Y.S.2d 266, 272-73, *cert. denied*, 454 U.S. 858 (1981).

[154] *See* Tune v. Walter Reed Army Medical Hosp., 602 F. Supp. 1452, 1455-56 (D.D.C. 1985)(first federal court recognizing right of competent adult to refuse treatment); *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 70, 438 N.Y.S.2d 266, 272-73 (Supreme Court repeatedly declined to consider constitutional right-to-die issue), *cert. denied*, 454 U.S. 858 (1981); J. Nowak, R. Rotunda & J. Young, Constitutional Law 764 (2d ed. 1983)(Supreme Court has not determined whether individual has constitutional right to forego life-sustaining treatment).

[155] *See* Miss. Code Ann. § 41-41-3 (Supp. 1984)(medical consent statute).

[156] *Id.* § 41-41-3(a).

[157] *Id.* § 41-41-3(b), (d), (e), (f), (j).

[158] *See* Prosser & Keeton on The Law of Torts 115-18 (W.P. Keeton 5th ed. 1984)(discussing effect of incapacity and agency on consent).

[159] Miss. Code Ann. § 41-41-3(k). The Act does not specify that one may refuse to consent, but states that one may not withhold consent without justification. *Id.*

[160] *Id.* (emphasis added).

protecting innocent third parties."[161] Without more, preservation of human life has not been held a sufficiently compelling state interest to override the patient's decision.[162] Were it otherwise, the state could compel any life-prolonging treatment, no matter how marginal the benefit to the patient.

While courts have not drawn bright lines to determine what constitutes a compelling state interest, a court is more likely to honor a patient's decision where the treatment will only delay death[163] or where the medical procedure will leave the person seriously impaired, and less likely to honor that decision where the objectionable treatment will restore the person to full physical health. As observed by one court, "the State's interest weakens and the right of privacy grows as the degree of bodily invasion increases and the prognosis dims, until the ultimate point when the individual's rights overcome the State's interest in preserving life."[164]

These principles have generally been applied consistently by the courts when competent patients refuse medical treatment. There is universal agreement that a patient for whom treatment merely prolongs dying may resist treatment.[165] The state's interest in preserving life weakens as the prognosis for the patient's cure dims.[166] The state's interest in safeguarding the integrity of the medical profession is minimal in such cases.[167] Most of the

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[161] *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1223 (1985); *see also* Commissioner of Corrections v. Myers, 379 Mass. 255, 399 N.E.2d 452, 456, 457 (1979)(listing these countervailing state interests and discussing governmental interests in medical treatment in a prison setting).

[162] *See, e.g., In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785, 789 (1978)(state's interest gave way to patient's right of privacy under particular facts of case).

[163] *See, e.g.,* Satz v. Perlmutter, 362 So. 2d 160, 161-62 (Fla. Dist. Ct. App. 1978)(competent and terminally ill adult allowed to discontinue medical treatment), *aff'd,* 379 So. 2d 359 (Fla. 1980).

[164] *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785, 789 (1978)(quoting *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 664 (1976)).

[165] Even advocates of aggressive treatment for seriously ill newborns recognize that treatment may be withdrawn if treatment merely prolongs dying. *See, e.g.,* Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis,* 27 STAN. L. REV. 213, 237 (1975)(stating that medical procedures are not required where there is no reasonable prospect of substantially prolonging child's life).

[166] *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785, 789 (1978).

[167] *See In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1224-25 (1985)(medical ethics do

litigated cases have involved older patients without dependents.[168] Even if dependents are present, however, their interest in brief prolongation of a patient's life is relatively slight; if death is imminent even with treatment, they can look forward neither to continued support nor to parental nurturing.

The case of the patient who resists surgical removal of a gangrenous extremity is more difficult. Unlike the patient for whom treatment merely prolongs dying, a patient whose death is imminent because of a gangrenous condition may live for a substantial period if surgery is ordered.[169] This brightened prognosis suggests a heightening of the state's interest in protection of life. Nevertheless, courts faced with such a nonconsenting patient have acquiesced in the patient's decision.[170] Those patients have been old and have found life as an invalid meaningless.[171] Courts have justified refusal to intervene because the degree of bodily invasion was great.[172]

The Jehovah's Witness cases also reflect this analysis,[173] although the cases are more complex than those discussed above. In the litigated cases, death would result without the transfusion

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not require medical intervention at all costs); *see also* Mannes, *Euthanasia vs. the Right to Life*, 27 BAYLOR L. REV. 68, 69 (1975)(quoting Francis Bacon's statement that physician's duty includes allowing patient "to make a fair and easy passage").

[168] *See, e.g.*, Satz v. Perlmutter, 362 So. 2d 160, 161 (Fla. Dist. Ct. App. 1978)(73-year-old suffering from Lou Gehrig's disease), *aff'd*, 379 So. 2d 359 (Fla. 1980); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1216 (1985)(84-year-old woman suffering from necrotic gangrenous ulcers and organic brain syndrome); Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232, 1233 (1978)(77-year-old widow suffering from gangrene in foot and leg).

[169] *See, e.g., In re* Quackenbush, 156 N.J. Super. 282, 383 F.2d 785, 787 (1978)(death would almost certainly follow if surgery were not performed, but patient faced good chance of recovery if treated).

[170] *See, e.g., id.* at 787, 790 (patient allowed to refuse surgery even though death might have been averted had operation been performed).

[171] *See, e.g.*, Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232, 1233-35 (1978)(77-year-old widow who had been unhappy since husband's death and did not wish to be burden on children).

[172] *See, e.g., In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785, 789 (1978)(state's interest in preservation of life did not overcome extent of bodily invasion suffered by patient).

[173] *See, e.g., In re* President of Georgetown College, 331 F.2d 1000 (D.C. Cir.)(blood transfusions ordered for nonconsenting patient who wanted to live, in order to preserve status quo and because of risks to hospital), *reh'g denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

while full recovery was probable if the treatment were provided.[174] Despite the excellent prognosis in such cases, courts have not always ordered transfusions for nonconsenting Jehovah's Witnesses.[175]

Allowing a patient to die in such cases has a superficial resemblance to suicide. The patient is consciously shortening his life by some measurable period of time.[176] Courts, theologians, and commentators, however, have distinguished the case of a suicide from that of a person who terminates treatment which provides no net benefit.[177] Although not all of the attempted distinctions are persuasive,[178] it is now beyond serious debate that the state's interest in suicide prevention does not compel treatment when "[r]efusing medical intervention merely allows the disease to take its natural course . . . ."[179]

Death of the patient who refuses removal of gangrenous tissue or of the Jehovah's Witness who refuses a life-saving blood transfusion is harder to distinguish from suicide. Courts have not always addressed this problem directly, relying for example on an unpersuasive distinction between unwanted as opposed to intended consequences of the refusal to accept treatment.[180] Ju-

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[174] *See, e.g., In re* President of Georgetown College, 331 F.2d 1000, 1007 (D.C. Cir. 1964))(patient had better than 50% chance of recovery if treated).

[175] *See, e.g., In re* Brooks' Estate, 32 Ill. 2d 361, 205 N.E.2d 435, 442 (1965)(patient allowed to refuse blood transfusions on religious grounds where doctor and hospital were released from civil liability, no minor children were involved, and there was no threat to social order).

[176] For example, in the law of homicide, any shortening of life constitutes murder, if done deliberately. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 35, at 250 (1972)("causing death" usually involves the notion of shortening life).

[177] *See, e.g., In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 665 (stating that removal of life-supporting apparatus is not equivalant to suicide under particular circumstances), *cert. denied*, 429 U.S. 922 (1976); THE SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON EUTHANASIA 7 (Vatican City, May 5, 1980)(stating that "right to die" does not mean right to procure death, but rather means right to die peacefully and with dignity).

[178] For example, some courts have relied on a distinction between the desire to die and the lack of a specific intent to die. *See In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1224 (1985)(intent was not to die but to control manner of concluding life). That distinction has been effectively rebutted elsewhere. *See* COMMISSION REPORT, *supra* note 1, at 77-82 (discussing "intended" and "unintended but foreseeable" consequences).

[179] *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1224 (1985).

[180] *See, e.g., In re* President of Georgetown College, 331 F.2d 1000, 1009 (D.C. Cir. 1964)(court raised issue whether patient's death might be considered suicide, and, there-

dicial unwillingness to confront the fact that they may be sanctioning suicide is understandable, given our society's hesitance to endorse or to encourage suicide.[181] The case law demonstrates, however, that even if those deaths are technically suicide, the patient's right to privacy is sufficiently compelling to prevent state intervention in those narrow circumstances.[182] Furthermore, the constitutional nature of the patient's right prevents the state from prosecuting family members and health care providers for aiding and abetting a suicide.[183]

In sum, the analysis commonly applied where competent patients who have not executed living wills resist life-saving medical treatment is as follows: the patient has a right to refuse treatment; death following refusal is not suicide, but the patient's will must be expressed unequivocally and can be overridden when necessary "to prevent the emotional and financial abandonment of the patient's minor children . . . ."[184]

The law of Mississippi is consistent with the foregoing analysis. Section 41-41-3 recognizes the right of a competent adult to

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fore, subject to criminal laws regulating suicide, but failed to resolve that issue because patient's death would be unwanted consequence of following her religious scruples).

[181] *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 425 (1977)(listing suicide prevention as compelling state interest). *See also* Comment, *Proposed State Euthanasia Statute: A Philosophical and Legal Analysis*, 3 HOFSTRA L. REV. 115, 117 (1975)(suggesting that death by choice violates principle of sanctity of life upon which our laws and society have been founded).

[182] One commentator has distinguished cases like those discussed in the text from suicides where state intervention may be appropriate: "A patient resisting medical treatment is not intent on repudiating life, but on avoiding a prolonged, undignified dying process or on implementing a philosophical or religious conviction. There is no assault on the body or active destruction of life; natural processes are simply allowed to run their course without artificial disruption." Cantor, Quinlan, *Privacy and the Handling of Incompetent Dying Patients*, 30 RUTGERS L. REV. 243, 249-50 (1977). Elsewhere, Professor Cantor has observed that psychiatric illness or mental disorder is a factor in 94 % of all suicide attempts. Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 256 n.142 (1973). These factors are not usually present in Jehovah's Witness cases where the patient's right to refuse treatment has been upheld. *See* Paris, *Compulsory Medical Treatment and Religious Freedom: Whose Law Shall Prevail?* 10 U.S.F.L. REV. 1, 23 n.139 (1975).

[183] *See, e.g., In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 670 (1976)(stating that third parties whose actions effectuate individual's right of privacy are constitutionally protected).

[184] *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1225 (1985).

resist treatment.[185] The person's refusal may be overridden, however, if the patient is (1) a man whose wife is pregnant,[186] (2) a woman who is pregnant,[187] or (3) a person who is "the parent of a minor living child."[188] Those instances reflect the state's interest in preventing abandonment of innocent third parties.[189] Thus, despite the Natural Death Act's silence regarding alternative bases for a right to die, health care providers should continue to honor a conscious competent patient's refusal to accept treatment absent a compelling reason to override that decision.

(ii) Incompetent Patients with Noncomplying Declarations

One of the most controversial aspects of Mississippi's Natural Death Act is the requirement that a person file his declaration with the Bureau of Vital Statistics.[190] The first problem is that few people will be aware of that requirement. Many people secure living wills from national organizations, and execute them without knowledge of local law.[191] Undoubtedly, many Mississippians have done so. However, Mississippi's filing requirement is unique.[192] Even within the state, it would appear that the filing requirement has not been widely publicized.[193] Thus, it is proba-

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[185] MISS. CODE ANN. § 41-41-3 (medical consent statute).

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] Presumably, the Act does not require the parent of a minor child to accept all therapies. Although the point is not entirely clear, he presumably could resist treatment on the same grounds as he could if acting as a surrogate. That is, he might be allowed to decline treatment if his decision were not arbitrary, obstinate, or without medical justification, the presence of a minor child notwithstanding.

[190] MISS. CODE ANN. § 41-41-107(2).

[191] *See* COMMISSION REPORT *supra* note 1, at 139-47 (discussing promulgation of living wills).

[192] *See supra* note 26. The only similar provision is found in the North Carolina Act. It requires a declaration to be certified by a notary public or clerk or assistant clerk of a county superior court. N.C. GEN. STAT. § 90-321(c)(4), (d)(3). The North Carolina Act is more flexible than that of Mississippi, however. For example, the North Carolina Act provides for procedures in cases where the patient has not executed a declaration. *Id.* § 90-322.

[193] On February 12, 1985, this writer gave a short presentation on Mississippi's Natural Death Act to a county bar association in north Mississippi. An informal survey was conducted, with 22 attorneys responding. The first question stated: "Your client is a physician confronted by a patient with end-stage kidney disease who wishes to be with-

ble that many more people execute noncomplying than complying documents.

Patients may become aware of the filing requirement in a health care setting. If a person is competent and faced with a terminal illness, it is possible that health care providers will instruct the person about the requirements of Mississippi's law. However, unless properly trained in dealing with dying patients, health care personnel may give the appearance of overreaching.[194] Further, some of those patients, even if competent, may be physically unable to execute a declaration.[195] Even if the requirement is communicated to some patients, a question remains whether the filing requirement is worth the limited benefits to patients and health care providers.

Having the document available through a state agency does offer some benefits. Clearly, a patient already incompetent when admitted to the hospital will benefit by the rule. Unless on file, his declaration might not come to the attention of the treating physician. It is also possible that family members unsympathetic to a patient's desire to die might withhold that instrument if it were not on file. Furthermore, the filing requirement may deter

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drawn from hemodialysis. Advise the hospital." The second question was as follows: "You represent a hospital where a patient in a persistently vegetative state is being kept alive by a respirator. The family requests that the treatment be terminated. Advise the hospital." Although the answers indicated an understanding of the general problem, only three mentioned that there is a filing requirement for a declaration. Obviously, if faced with the problem, those attorneys would have reviewed the Act. Nevertheless, if 86% of a group of attorneys is unaware of the filing requirement, it is probable that an even smaller group of the general population is aware of that requirement.

The State Board of Health has printed a form, including a declaration tracking the statute and instructing the user of the filing requirement. However, the utility of that form will depend on public awareness in the first instance.

[194] *See* COMMISSION REPORT, *supra* note 1, at 57-60 (discussing need for educational reform to train health care providers to deal with dying patient, and stating that "many professionals tend to avoid dying patients"). A number of statutes recognize the problem of overreaching in the nursing home setting and provide for, in effect, an ombudsman to oversee execution of a declaration by patients in nursing homes. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7188.5. *See also In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985)(recognizing need for special protection and procedures for those in nursing homes).

[195] In the context of revocation, that contingency was recognized in Mississippi's Natural Death Act. *See* MISS. CODE ANN. § 41-41-109(3)(providing for revocation, oral or otherwise, for patients unable to execute formal revocation). However, the problem of executing a declaration in the first place may still exist.

a person's efforts to forge a declaration.[196] Of course, one contemplating such a course of action is far more likely to be deterred by that section of the Act which provides for a twenty-year term of imprisonment for anyone who hastens the death of another.[197] In addition, the witness requirement makes forgery even more unlikely.

While the filing requirement may provide certain benefits, it may also prove a barrier to the effectuation of a patient's desires concerning medical treatment. A hospital is likely to be confronted far more frequently by patients without properly filed documents than by those who have filed in accordance with the Act.[198] For example, a patient admitted to the hospital may have made a declaration substantially in compliance with the Act, but which has not been filed.[199] The health care provider must decide whether to give any effect to that statement of the patient's wishes. If the unfiled declaration is not legally binding on the physician, the patient's right to refuse medical treatment is effectively nullified.

Initially, some jurisdictions address that problem by specific provision or by implication. For example, California provides that the document is evidence of the patient's desires but is not controlling on that question.[200] Some states provide specifically that the right to execute a formal declaration created by a natural death act is cumulative with other rights,[201] rather than the exclusive way in which to refuse unwanted treatment. Thus it might be argued that any reliable expression of a person's decision about treatment ought to be honored.

Mississippi's Natural Death Act is silent on what legal effect is to be given a noncomplying document. Mississippi does recognize a general right of a competent patient to refuse consent on his own behalf or on behalf of an incompetent patient under cer-

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[196] The false filing of the document may also constitute separate additional crimes to that provided in the Act. *See, e.g.*, MISS. CODE ANN. § 97-21-51 (1972)(forgery).

[197] MISS. CODE ANN. § 41-41-121.

[198] *See supra* notes 190-91 and accompanying text.

[199] *See, e.g.*, John F. Kennedy Hosp. v. Bludworth, 452 So. 2d 921 (Fla. 1984)(stating that living will would be persuasive evidence of person's intention).

[200] CAL. HEALTH & SAFETY CODE § 7191(c).

[201] *See supra* note 137.

tain circumstances.[202] Those provisions do not suggest how a decision is to be made for the incompetent patient,[203] or whether the noncomplying living will has legal force. The failure to resolve that dilemma will undoubtedly cause indecision on the part of health care providers. As indicated previously, clear legislation allows patients and health care providers to base a course of treatment on consultation rather than litigation.[204] Faced with Mississippi's Natural Death Act, counsel for Mississippi's hospitals, nurses, and doctors will find advising clients difficult. Counsel must guess whether a physician's conduct may be found criminal or unprofessional if he follows a noncomplying declaration.[205] Unfortunately, in an area where clear legal answers are necessary, there is no definitive answer. This writer believes that the patient has a right to refuse treatment independent of the statute and that, as a general matter, the health care provider should accept the patient's assertion of his right whenever that expression is unambiguous.

As discussed above, there is substantial agreement that a person has a constitutional right to refuse medical treatment.[206] Interestingly, most of the decisions governing refusal of treatment have involved incompetent patients.[207] While *Quinlan* is frequently cited as the leading case on a competent patient's right to terminate treatment, it involved a persistently vegetative patient whose life was apparently being sustained by a respirator.[208] However, once a court recognizes that a competent patient has a constitutional right to refuse treatment, it does not necessarily follow that a patient will exercise that right.[209] In-

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[202] MISS. CODE ANN. § 41-41-3.

[203] *See infra* notes 247-56 and accompanying text.

[204] *See supra* notes 4-16 and accompanying text.

[205] In theory, any shortening of the life of another is homicide. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 35, at 250 (1972)("one who hastens the victim's death is a cause of his death").

[206] *See supra* notes 139-84 and accompanying text.

[207] For a list of cases involving the treatment of incompetent patients, see notes 231-34.

[208] 355 A.2d 647.

[209] *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 154, at 764 ("it is important that courts and legislators clearly separate the question of whether an individual should have the right to forego medical treatment from the question of whether other persons can determine when life-support or life-saving techniques need not be employed to con-

deed, probably as often as patients decide to terminate treatment, other patients pursue painful therapies with little chance of recovery.[210] It is unclear, therefore, how an incompetent patient, absent an advance directive, might exercise the right to refuse treatment. As observed by the New Jersey Supreme Court, an "affirmation of [a comatose patient's] independent right of choice . . . would ordinarily be based upon her competency to assert it."[211]

Persistently vegetative patients have virtually no chance of recovery,[212] but they may "live" for prolonged periods of time.[213] Thus, continued treatment would appear to be a poor use of limited medical resources. Termination of treatment based only on social utility, however, is certainly a form of euthanasia.[214] While euthanasia may be morally defensible in some cases,[215] no court or legislature in the United States has been willing to adopt that view.[216] That problem—permitting termination of treatment which offers no benefit to the patient without endorsing a form of euthanasia—was resolved in *Quinlan* by resort to the substituted judgment test: "The only practical way to prevent destruc-

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tinue an individual's existence").

[210] *See* Kamisar, *supra* note 130, at 8-12 (many terminally ill patients choose life-sustaining treatment).

[211] *Quinlan*, 355 A.2d at 664.

[212] *See* COMMISSION REPORT, *supra* note 1, at 181-82 (stating that "[d]isability is total and no return to an even minimal level of social or human functioning is possible" where diagnosis of permanent unconsciousness is correct).

[213] *See, e.g.*, Field & Romanus, *A Decerebrate Patient: Eighteen Years of Care*, 45 CONN. MED. 717 (1981)(summarizing 18 years of medical treatment of decerebrate quadraplegic patient). Karen Ann Quinlan remained alive until June 11, 1985, even though she was weaned from the respirator. *See Living Wills Gain Acceptance*, N.Y. Times, Sept. 20, 1984, at § C9, col. 3.

[214] *See* Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969, 1042 (1958)("euthanasia program may only be the wedge for far more objectionable practices").

[215] *See* D. MAGUIRE, DEATH BY CHOICE 78 (1974)(stating that choosing death in some instances may be "truly human and moral").

[216] Courts and legislatures have specifically disclaimed that they are authorizing euthanasia. *See, e.g., Quinlan*, 355 A.2d at 658 (discussing amicus brief distinguishing termination of extraordinary treatment from euthanasia); ALA. CODE § 22-8A-10 (1975)("Nothing in this chapter shall be construed to condone, authorize or approve mercy killing . . ."); CAL. HEALTH & SAFETY CODE § 7195 (same); DEL. CODE ANN. tit. 16, ch. 25 (revisor's notes, quoting § 3 of Del. Laws, c. 386)(same); D.C. CODE ANN. § 6-2430 (West Supp. 1985)(same).

tion of [her] right is to permit the guardian and family of Karen to render their best judgment" as to her choice concerning continued treatment.[217] Once the patient's putative choice is known, death following withdrawal of treatment cannot be construed as involuntary euthanasia. Of course, this dilemma is less troubling if a patient has prepared an advance directive.

It might be argued that Mississippi's Natural Death Act only regulates procedures whereby a patient's constitutional right may be exercised.[218] It is well settled that states have an interest in establishing such procedures even though they may at times adversely affect the exercise of federal rights.[219] At least in the abortion context, however, privacy is a fundamental right and state regulation is subject to the strict scrutiny test.[220] Thus, the Supreme Court has held invalid state procedures which have unduly burdened a woman's right to secure an abortion.[221] Elsewhere, the Court has held that even when the state regulates an area in which it has a legitimate interest, it cannot do so "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."[222]

Given that no other jurisdiction has restricted the exercise of a patient's right to make a declaration by a requirement of formal filing,[223] it is difficult to argue that Mississippi has used

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[217] *Quinlan*, 355 A.2d at 664.

[218] For an argument that the Act is ambiguous concerning the treatments which may be resisted, see notes 284-306 and accompanying text.

[219] Henry v. Mississippi, 379 U.S. 443, 447 (1965)(state must have legitimate interest in its procedural rules if litigant's procedural default prevents vindication of federal right); Tileston v. Ulman, 318 U.S. 44, 46 (1943)(state court's consistent practice of declining to answer questions not reserved prevented Supreme Court review).

[220] Roe v. Wade, 413 U.S. 113, 152-54 (1973); *see* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 154, at 745 (state must show compelling interest).

[221] *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 192-201 (1973)(law requiring performance of abortions in hospital, interposition of hospital committee, confirmation of other physicians, and limiting abortion to Georgia residents, held unconstitutional). *See also* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)(holding that state regulation of abortion must be supported by compelling state interest); Planned Parenthood v. Danforth, 428 U.S. 52, 67-75 (1976)(spousal consent provision and blanket parental consent requirement for minors held unconstitutional).

[222] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[223] *See supra* note 192 and accompanying text.

the least restrictive means to achieve its purpose in protecting patients' lives. As noted above, the requirement, in part, aids a patient to assert the right to refuse treatment.[224] This justification, however, does not lead to the conclusion that unfiled documents or oral declarations should be invalid. The state unquestionably has an interest in preventing the forgery of a declaration, but even without the filing requirement the Mississippi Act includes ample protection against that fairly remote possibility. The Act requires the signatures of two witnesses who can gain nothing from the declarant's death and who must know the declarant personally.[225] Further, the false filing may be a criminal act; if so, the false-filer would be subject to a twenty-year sentence for forging the declaration,[226] as well as to the lesser penalty for general forgery.[227] The filing requirement adds little, if anything, to this deterrent scheme.

Thus, health care providers should give legal effect to a patient's noncomplying advance directive if evidence exists that it reflects the patient's actual preference. If the Act is read as the exclusive procedure whereby a patient may assert his right to terminate treatment by advance directive, it almost certainly conflicts with the patient's constitutional right to privacy.[228]

(iii) Incompetent Patients with No Declaration

Many jurisdictions have failed to enact procedures governing withdrawal of treatment from incompetent patients who have not executed declarations.[229] That has been a source of criticism of those acts.[230] Mississippi's Act similarly fails to ad-

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[224] *See supra* text accompanying notes 196-97.

[225] MISS. CODE ANN. § 41-41-107.

[226] MISS. CODE ANN. § 41-41-121.

[227] *See, e.g.*, MISS. CODE ANN. § 97-21-33 (providing maximum 15-year term of imprisonment for forgery).

[228] Counsel for health care providers should keep in mind that what is really at stake is whether the physician will get a good faith immunity. The Act provides only that hastening the death of another by forging a declaration or by destroying a revocation is a criminal act. *See* MISS. CODE ANN. § 41-41-21.

[229] *See, e.g.*, ALA. CODE §§ 22-8A-1 to -10 (1975); CAL. HEALTH & SAFETY CODE §§ 7185-7195; D.C. CODE ANN. §§ 6-2421 to -2430 (Supp. 1984); KAN. STAT. ANN. §§ 65-28,101 to -28,109.

[230] *See supra* notes 39-41 and accompanying text.

dress the problem of decision-making for incompetents. Further, its medical consent law is ambiguous.

Insofar as legislation should clarify patients' and health care providers' rights without recourse to litigation, the Act's silence on the issue is a glaring failure. Treatment decisions on behalf of seriously ill newborns[231] and retarded,[232] senile,[233] or comatose patients[234] who have not executed declarations raise the most

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[231] *See, e.g.*, Weber v. Stony Brook Hosp., 60 N.Y.2d 208, 456 N.E.2d 1186, 1187, 469 N.Y.S.2d 63, 64 (child born with spinal bifida and complicating disorders), *cert. denied*, 104 S.Ct. 560 (1983). For a discussion of some of the moral problems raised by such cases, see generally P. RAMSEY, ETHICS AT THE EDGES OF LIFE (1978)(discussing medical and legal intersections at the beginning and ending of life); *Defective Newborns, supra* note 11, at 244-61 (discussing issues raised by withholding medical treatment from ill infants). *See also* Vitiello, *The Baby Jane Doe Litigation and Section 504: An Exercise in Raw Executive Power*, 17 CONN. L. REV. 95, 102-04 (1984)(discussing severely impaired newborn).

[232] *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 419 (1977)(mentally retarded adult suffering from leukemia); *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 66, 438 N.Y.S.2d 266, 270-71 (mentally retarded and terminally ill adult cancer patient), *cert. denied*, 454 U.S. 858 (1981). For an analysis of *Saikewicz*, see Baron, *Assuring "Detached but Passionate Investigation and Decision": The Role of Guardians Ad Litem in* Saikewicz*-type Cases, reprinted in* LEGAL AND ETHICAL ASPECTS, *supra* note 9, at 114.

[233] *See, e.g., In re* Spring, 380 Mass. 629, 405 N.E.2d 115, 118 (1980)(adult with chronic organic brain syndrome suffering from end-stage kidney disease); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1216 (1985)(incompetent elderly patient). For some problems raised by the *Spring* case, see Glantz, *The Case of Earle Spring: Terminating Treatment on the Senile, reprinted in* LEGAL AND ETHICAL ASPECTS, *supra* note 9, at 173; Dunn & Ator, Vox Clamantis in Deserto: *Do You* Really *Mean What You Say in* Spring*?*, *id.* at 177.

[234] *See, e.g.*, Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484, 493 (1983)(discontinuance of treatment of comatose patient not unlawful); Severns v. Wilmington Medical Center, 421 A.2d 1334, 1347 (Del. 1980)(husband of comatose wife had standing to apply for court order authorizing removal of life-sustaining supports); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 651 (parent seeking discontinuance of extraordinary treatment for 21-year-old daughter in persistent vegetative state), *cert. denied*, 429 U.S. 922 (1976); Leach v. Akron Gen. Medical Center, 68 Ohio Misc. 1, 426 N.E.2d 809, 810-11 (C.P. 1980)(authorizing guardian to disconnect respirator from patient in vegetative state); *In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738, 740 (1983)(same). For a discussion of the moral problem raised by withdrawal of artificial feeding devices in such cases, see Capron, *Ironies and Tensions in Feeding the Dying*, 14 HASTINGS CENTER REP. No. 5, at 32-35 (Oct. 1984)(comparing denial of nutrition to dying patients with denial of other medical treatment); Lynn & Childress, *Must Patients Always Be Given Food and Water?*, 13 HASTINGS CENTER REP. No. 5, at 18 (Oct. 1983)(justifying withholding food and water from comatose patients). *See also In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1227-28 (1985)(discussing withdrawal of treatment from comatose patients).

difficult moral questions.[235] Moreover, cases in which patients have executed living wills are rare.[236] Thus a statute dealing only with formal declarations addresses only a fraction of the problem. Counsel for health care providers will probably advise their clients to continue treatment in such cases absent clear authorization for its withdrawal.[237] This is unfortunate, because the weight of authority permits withdrawal of treatment in such cases.

As stated above, most of the litigated cases have involved withdrawal of treatment from incompetent patients.[238] Those cases have recognized a right to refuse treatment which survives the ability of the patient to assert the right on his own behalf. As stated by the New Jersey Supreme Court in *Quinlan*, "[t]he only practical way to prevent destruction of [her] right is to permit the guardian and family of Karen to render their best judgment" as to her choice concerning continued treatment.[239] This standard is not without difficulty. A person may not have expressed views from which his choice may be inferred.[240] More difficult questions arise when the incompetent patient has never been able to form values or to understand such questions.[241] Nevertheless, a majority of courts faced with the problem have followed *Quinlan* on this point.[242]

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[235] *See* Kamisar, *supra* note 130 (raising moral questions about *Quinlan* decision).

[236] John F. Kennedy Hosp. v. Bludworth, 452 So. 2d 921 (Fla. 1984) is the first appellate decision giving legal effect to such a document.

[237] *See, e.g.*, Liacos, *Dilemmas of Dying, reprinted in* LEGAL AND ETHICAL ASPECTS, *supra* note 9, at 149, 153 (characterizing confusion caused by *Saikewicz* decision as "an example not only of an abundance of caution but of hysteria on the part of legal counsel who advised hospitals that such extreme measures needed to be taken in order to protect the hospital and the medical staff"). *See also* Annas, *Reconciling* Quinlan *and* Saikewicz: *Decision Making for the Terminally Ill Incompetent, id.* at 28, 39-42 (suggesting that court and counsel must share blame for confusion caused by *Saikewicz* case).

[238] *See supra* notes 229-36 and accompanying text.

[239] 355 A.2d at 664.

[240] *See* Kamisar, *supra* note 130, at 5-7 (arguing that Karen Ann Quinlan's guardian would have no information on which to base his judgment concerning her putative choice). *But see* Vitiello, *supra* note 231, at 128 (arguing that person's choice may be inferred from his values and goals, in absence of explicit statement of his choice).

[241] *See* Vitiello, *supra* note 231, at 128-30 (discussing instances in which decision-makers will have no basis from which to infer patient's choice).

[242] *See, e.g.*, Severns v. Wilmington Medical Center, 421 A.2d 1334, 1347 (Del. 1980)(husband of comatose wife had standing to apply for removal of her life-sustaining

Legislation in this area is often most appropriate. For example, absent legislative guidance, the New Jersey Supreme Court established procedures whereby future cases might be resolved without constant resort to litigation.[243] The court's reliance on hospital ethics committees has proven the most controversial aspect of the *Quinlan* case, subjecting the court to the criticism that it usurped the legislature's role.[244] The absence of hearings and input of concerned parties that would be available to a legislature may explain the confusion concerning the role of the ethics committee ordained by the court.[245]

Even if an incompetent has a constitutional right to be withdrawn from certain treatments, there are numerous procedural questions rightly decided by the legislature. These questions include, for example, the following: Who should serve as the incompetent's surrogate? How should disputes be resolved if family members disagree among themselves or with health care providers on a course of treatment? How many doctors should certify the patient's prognosis?[246]

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supports); Leach v. Akron Gen. Medical Center, 68 Ohio Misc. 1, 426 N.E.2d 809, 810 (C.P. 1980)(discussing husband's motion to terminate respirator of wife who was in chronic vegetative state); *In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738, 751 (1983)(guardian able to exercise incompetent's personal right to refuse life-sustaining treatment in appropriate circumstances). *See also* COMMISSION REPORT, *supra* note 1, at 194-96 (discussing role of guardian in cases comparable to *Quinlan*).

[243] *Quinlan*, 355 A.2d at 671. The court stated the following:

> Upon the concurrence of the guardian and family of Karen, should the responsible attending physicians conclude that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state and that the life-support apparatus now being administered to Karen should be discontinued, they shall consult with the hospital "Ethics Committee" or like body of the institution in which Karen is then hospitalized. If that consultative body agrees that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn . . . .

Id.

[244] *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 434 (1977)(rejecting *Quinlan* approach of entrusting decision whether to continue artificial life support to guardian, family, attending physician, and hospital "ethics committee"); *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 67, 438 N.Y.S.2d 266, 269 (emphasizing that court's role is limited to redressing issues raised by facts of case), *cert. denied*, 454 U.S. 858 (1981).

[245] *See* Annas, *supra* note 237, at 49.

[246] *See, e.g.*, Declarations Concerning Life-sustaining Procedures, 1985 La. Sess.

Mississippi already provides limited legislative guidance in this area. Section 41-41-3 provides that a person may consent to medical treatment on behalf of others under certain circumstances.[247] For example, an adult may consent if treatment is needed for his minor child;[248] for his spouse if she is of unsound mind;[249] or for another person for whom he stands *in loco parentis*.[250] By implication, the Act allows the person to refuse consent. A court may override that refusal to consent when the person has refused "arbitrarily, obstinately or without reasonable medical justification. . . ."[251]

Section 41-41-3 was not designed to resolve complex problems created by currently available medical technology that perhaps may sustain an unconscious patient indefinitely.[252] Instead, the Medical Consent Act reflects the need to free health care professionals from concern about being sued for assault and battery when the proper consenting party was not immediately available.[253] The Act is an inadequate substitute for a carefully drafted statute intended to address treatment for comatose patients. For example, the Act does not suggest how a surrogate is to decide whether to consent to treatment. While the Act does provide that a decision-maker may not withhold consent arbitrarily, it does not allow a surrogate to take account of the patient's actual preferences.[254] It does not indicate whether a physician's prognosis must be confirmed by his colleagues.[255]

Law Serv. Act No. 187 (West)(to be codified at LA. REV. STAT. ANN. § 40:1299.58.5)(establishing procedures in absence of a declaration); *id.* (to be codified at LA. REV. STAT. ANN. § 40:1299.58.6)(establishing procedures in cases of terminally ill minors).

[247] MISS. CODE ANN. § 41-41-3 (medical consent statute).

[248] *Id.* § 41-41-3(b).

[249] *Id.* § 41-41-3(d).

[250] *Id.* § 41-41-3(e).

[251] MISS. CODE ANN. § 41-41-3. MISS. CODE ANN. § 41-41-9 permits a court to enter an order compelling treatment in such cases, but does not specify the circumstances under which such an order is proper.

[252] *See* Field & Romanus, *supra* note 213 (decerebrate, quadraplegic patient sustained for 18 years).

[253] *See* PROSSER & KEETON, *supra* note 158, at 115-21 (discussing torts of assault and battery).

[254] For a discussion of the requirement of substituted judgment, see *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1229-33 (1985)(discussing subjective and objective tests).

[255] *Cf.* Declarations Concerning Life-Sustaining Procedues, 1985 La. Sess. Law Serv. Act No. 187 (West)(to be codified at LA. REV. STAT. ANN. § 40:1299.58.5)(procedures in

Finally, it does not protect the decision-maker from suit even if he exercises his judgment in good faith.[256]

This writer believes that the Mississippi legislature should address the problem of adequate procedures for withdrawal of treatment from incompetent patients. Recourse to the Medical Consent Act is unsatisfactory because it does not require that such decisions should be governed where possible by the unconscious patient's putative choice.

2. Pregnancy

Several states, including Mississippi, provide that a declaration is invalid if the declarant is pregnant.[257] Mississippi's Act, for example, provides that "if [a declarant] ha[s] been diagnosed as pregnant and that diagnosis is known to [the attending] physician, this declaration shall have no force or effect during the course of [the] pregnancy."[258] That prohibition would appear to be mandatory in that the Act requires that a declaration "shall be in substantially the [statutory] form," including the quoted provision.[259] It would also appear to apply without regard to the gravida's awareness of her pregnancy.

This provision raises a very interesting constitutional question. To illustrate the problem, one might hypothesize three different terminally ill patients: the first, a conscious woman in the third trimester of her pregnancy; the second, a comatose woman in an early stage of pregnancy; and the third, a conscious woman who is also in an early stage of pregnancy. In each instance, it should be assumed that the patient has complied with all other provisions of the Act and was aware of her pregnancy when she executed her declaration. As indicated above, the weight of authority is that there is a constitutional right to privacy, encom-

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absence of declaration).

[256] *Cf.* MISS. CODE ANN. § 41-41-117 (exempting physician who acts in good faith and in compliance with Mississippi's Natural Death Act from criminal prosecution or civil liability).

[257] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7188(3)(stating that directive is to have no effect during course of pregnancy); DEL. CODE ANN. tit. 16, § 2503(d)(same); KAN. STAT. ANN. § 65-28,103(a)(same); NEV. REV. STAT. § 449.610 (1979)(same).

[258] MISS. CODE ANN. § 41-41-107(1).

[259] *Id.*

passing a right to refuse medical treatment.[260] In the hypothetical cases, each patient has chosen to exercise that right by executing a declaration to terminate unwanted treatment. The problem, of course, is that termination of treatment has the unfortunate additional consequence of terminating the pregnancy.

If the statute prohibits exercise of a patient's privacy right under all circumstances, it would be hard to reconcile with *Roe v. Wade*[261] and its progeny.[262] *Roe* held that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," and that the right is fundamental.[263] The state's interest in the mother's health and life of the fetus are not sufficiently compelling to prohibit abortion until the third trimester. During the third trimester, the state's interest in the viable fetus is sufficiently compelling to prohibit abortions not necessary to protect the mother.[264] Some subsequent decisions have limited abortions, for example, by upholding Congress's withdrawal of funding for abortions[265] and by upholding a statute requiring that a minor's parents be notified about her intention to have an abortion.[266] However, the Court has not abandoned a woman's fundamental right of choice free from interference by the state, spouse, or physician.[267]

If section 41-41-107's prohibition is mandatory, it almost certainly violates two separate privacy rights: freedom to terminate a pregnancy and freedom to refuse medical treatment. *Roe*

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[260] *See supra* notes 139-84 and accompanying text.

[261] 410 U.S. 113 (1973).

[262] *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)(abortion provisions requiring waiting period and parental consent for unmarried minors under 15 held unconstitutional); Bellotti v. Baird, 443 U.S. 622, 651 (1979)(abortion statute requiring consent of parents or court approval for unmarried women under 18 held unconstitutional); Colautti v. Franklin, 439 U.S. 379, 390-97 (1979)(statute basing liability on physician's determination of whether fetus is or may be viable is unconstitutionally vague); Planned Parenthood v. Danforth, 428 U.S. 52, 67-75 (1976)(abortion provision requiring spousal consent and blanket parental consent held unconstitutional).

[263] 410 U.S. at 153.

[264] *Id.* at 163-64.

[265] *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980).

[266] *See, e.g.*, H.L. v. Matheson, 450 U.S. 398 (1981).

[267] *See* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)(reaffirming *Roe* and emphasizing woman's right to decide whether to terminate her pregnancy).

permits the state to regulate the decision of the gravida in the third trimester.[268] A woman in an earlier stage of pregnancy, however, who would undergo conscious suffering if compelled to accept treatment, would appear to have at least as great a right to terminate her pregnancy as would a woman not afflicted with a terminal illness. It is inconceivable that the patient's illness giving rise to the desire to terminate treatment would somehow increase the state's interest in the life of the fetus.

The hardest case is that of the patient early in pregnancy who becomes comatose after having expressed a desire to terminate treatment and after discovering that she is pregnant. Once she is incapable of feeling pain and experiencing her environment, she would appear to be indifferent to termination of treatment. Although the interest of the fetus in its life would seem to outweigh the patient's interest in being allowed to die,[269] there are competing interests. For example, the patient has an interest before losing consciousness in knowing that her life will not be prolonged by artificial means. This apprehension cannot be discounted. It has caused perhaps millions of people to execute living wills.[270] Additionally, in other contexts a patient's wishes are not rendered inoperative simply because she no longer experiences pain or her environment. It would be unconscionable, for example, to use that person's vital organs to benefit others absent her actual consent, or perhaps a "consent" based on the substituted judgment of a surrogate decisionmaker.[271] Forcing the gravida to carry her fetus to term in such a case is to treat her as a means, condemned almost universally by moralists.[272]

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[268] 410 U.S. at 163-64.

[269] *Cf.* Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457, 459-60 (1981)(state supreme court affirmed order of lower court authorizing hospital to perform caesarean section to deliver infant and to give nonconsenting mother, a Jehovah's Witness, blood transfusion). *Jefferson* does not establish a broad right of intervention in that the fetus had been carried to term.

[270] *See supra* notes 7-8 and accompanying text.

[271] *See* Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 52-78 (1976)(discussing ethical and legal problems of transplanting organs from incompetent persons).

[272] *See* T. BEAUCHAMP & J. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 59, 62 (2d ed. 1983)(stating that interference with one's autonomy violates right to self-governance).

However that last case might be resolved, the legislature has painted with too broad a brush. The prohibition against termination of treatment for a pregnant patient appears absolute. The state may unquestionably regulate third trimester pregnancies. It ought to be able regulate cases in which the patient is unaware that she is pregnant prior to losing consciousness on a reasonable presumption that a mother would choose to give her fetus a chance for life in a situation in which little additional suffering is imposed upon her. It seems inconceivable, however, in light of *Roe v. Wade*,[273] that the state may compel a patient in the early term of her pregnancy to carry the fetus to term.

3. The Standard Form and Extraordinary Treatment

Mississippi's Natural Death Act provides that a declarant must substantially follow the form provided in section 41-41-107.[274] That form sets forth several requirements: the patient's condition must be terminal; death must be imminent; and at least three physicians must confirm that prognosis. If those conditions are met, life-sustaining mechanisms may be refused or withdrawn.[275] This final step consists of the "cessation of use of extraordinary techniques and applications, including mechanical devices, which prolong life through artificial means."[276] Two distinct problems are raised by the standard form in section 41-41-107. First, there is serious question about the wisdom of using standard forms generally. Second, it is unclear what the concept of "extraordinary techniques" encompasses.

(i) Standard Forms: The Broad Brush

Section 41-41-107 requires that a person's declaration must substantially follow the prescribed form. Mississippi is not alone in that requirement.[277]

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[273] 410 U.S. 113 (1973).

[274] MISS. CODE ANN. § 41-41-107(1).

[275] *Id.*

[276] *Id.* § 41-41-103(b).

[277] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7188 (stating that directive shall be substantially in form given by statute); IDAHO CODE § 39-4504 (1984)(same); NEV. REV.

As discussed above, the right to refuse treatment is based on a constitutional right to privacy.[278] Individuals demonstrate different tolerance to pain. Some may choose not to exercise their constitutional right at all. Others may choose to exercise it to a greater or lesser extent. For example, one patient may not resist the use of a respirator, but may want a "no-code"[279] entered into his medical chart. Another patient might resist both therapies.[280] Critics of the standard form correctly argue that such forms fail to account for individual preferences because they discourage or forbid variation. Further, patients often learn about these forms through the popular media.[281] One of the risks of such easy access to a standard form is that it may be executed without serious thought about the content of the form or proper understanding of its language.

The President's *Commission Report* reflects these concerns. It recommends that a person consult his physician prior to signing an advance directive.[282] Further, it praises jurisdictions with durable power of attorney provisions which are effective even after the person executing the document becomes incompetent and which allow the agent to make medical decisions on behalf of an incompetent principal.[283] These provisions may supplement, not supplant, the right to execute a living will referring to specific unwanted therapies.[284] Additionally, a durable power of

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STAT. § 449.610 (1979)(same); OR. REV. STAT. § 97.055 (1983)(same).

[278] *See supra* notes 139-84 and accompanying text.

[279] A "no-code" order is an order placed in the record of a terminally ill patient that "directs a hospital and its staff not to apply extraordinary intrusive resuscitative measures in the event of cardiac or respiratory failure." *Custody of a Minor*, 385 Mass. 697, 434 N.E.2d 601, 602 n.1 (1982).

[280] *See* COMMISSION REPORT, *supra* note 1, at 43-60 (discussing patients' decisions in foregoing treatment).

[281] For example, many people have learned about living wills from reading the syndicated column "Dear Abby." "Two columns [of 'Dear Abby' in 1983] resulted in a flood of nearly 100,000 requests to the Society [for the Right to Die] for [living will forms]—impressive testimony to the influence she has on her readers and to the public's ever-increasing interest in the subject." Society for the Right to Die Newsletter, Spring 1984, at 5.

[282] COMMISSION REPORT, *supra* note 1, at 153.

[283] *Id.* at 145-47.

[284] *See, e.g.*, Declarations Concerning Life-Sustaining Procedures, 1985 La. Sess. Law Serv. Act No. 187 (West)(to be codified at LA. REV. STAT. ANN. § 40:1299.58.3(C)(2))(providing that declaration may include designation of agent to make

attorney may make more probable serious reflection by the declarant. The declarant is more likely to discuss his preferences if he appoints an agent than if he merely signs a standard form. Thus, the agent's choice will be informed, leaving less need for interpretation of the patient's actual preferences.[285]

Mississippi recently amended its power of attorney statute. It now provides that "[t]he subsequent disability or incompetence of a principal shall not revoke or terminate the authority of an attorney-in-fact who acts under a power of attorney in a writing. . ." which demonstrates that the principal intended the power to survive his incompetence.[286] The statute is silent, however, on whether the legislature intended to allow the agent to make decisions affecting medical treatment. Given the Natural Death Act's insistence on the use of a standard form and the lack of recognition of additional rights of patients, it is doubtful that the legislature intended to extend the power of attorney provisions so far. This is unfortunate. Recent statutes from other states have adopted that approach by allowing appointment of an agent and by making use of a standard form optional.[287] Recourse to an agent appointed by the patient reflects more clearly the patient's actual preferences than does recourse to a standard form subject to interpretation by, for example, the patient's physician or a court. Mississippi might easily amend its act to provide similar flexibility.

(ii) Extraordinary Treatment

The distinction between ordinary and extraordinary care has a well-established pedigree in medical ethics. At least as early as 1957, the Catholic Church used that distinction to delineate situations in which patients and their families may morally

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treatment decisions).

[285] COMMISSION REPORT, *supra* note 1, at 153.

[286] MISS. CODE ANN. § 87-3-13(3)(Supp. 1984).

[287] *See, e.g.*, DEL. CODE ANN. tit. 16, § 2502(b)(allowing adult to appoint agent by written declaration); Declarations Concerning Life-Sustaining Procedures, 1985 La. Sess. Law Serv. Act No. 187 (West)(to be codified at LA. REV. STAT. ANN. § 40:1299.58.3(C)(1))(allowing variation from example form by permitting designation of agent to make treatment decisions).

reject available treatment.[288] More recently, however, moral philosophers and theologians have recognized inherent ambiguity in those terms and now prefer a distinction based on proportionate benefits promised by the treatment in question.[289]

The President's Commission summarized some of the meanings given to those terms:

> The most natural understanding of the ordinary/extraordinary distinction is as the difference between common and unusual care. . . . This interprets the distinction in a literal, statistical sense and, no doubt, is what some of its users intend. Related, though different, is the idea that ordinary care is simple and that extraordinary care is complex, elaborate, or artificial, or that it employs elaborate technology and/or great efforts and expense.[290]

A third interpretation of those terms focuses on the "usefulness or burdensomeness of a particular therapy."[291] The Commission found that this third interpretation "does have moral significance,"[292] but rejected use of those terms because "[c]larity and understanding in this area will be enhanced if laws, judicial opinions, regulations, and medical policies speak instead in terms of the proportionate benefit and burdens of treatment as viewed by particular patients."[293]

Section 41-41-101 of Mississippi's Natural Death Act defines "life-sustaining mechanisms" as "extraordinary techniques and applications, including mechanical devices, which prolong life through artificial means."[294] The statute does not further define "extraordinary techniques," thus permitting inconsistent interpretations. One permissible interpretation is that "extraordi-

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[288] *See Quinlan*, 355 A.2d at 658 (discussing reliance on distinction made by Pope Pius XII in his address on Nov. 24, 1957).

[289] *See, e.g.*, T. BEAUCHAMP & J. CHILDRESS, *supra* note 272, at 126-36 (stating that treatment decisions should be based on prospective benefit to patient). *See also* THE SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON EUTHANASIA 9 (Vatican City, May 5, 1980)(permitting decision to refuse life-prolonging treatment where death is imminent in spite of medical care).

[290] COMMISSION REPORT, *supra* note 1, at 84.

[291] *Id.* at 88.

[292] *Id.*

[293] *Id.* at 84.

[294] MISS. CODE ANN. § 41-41-103(b).

nary" refers to the nature of the device. The statute refers to techniques and applications, as well as to mechanisms. As quoted above, the term may be used to mean "complex, elaborate or artificial or that it employs elaborate technology. . . ."[295]

The only indication that "extraordinary" has a broader meaning is that the statute allows withdrawal of a patient with a terminal condition, near death.[296] Thus it allows withdrawal of therapies that provide little net benefit to the patient. Therapies other than complex ones, however, may also provide no net benefit. A frequent example is the denial of antibiotics to the comatose patient or to a person ravaged by cancer who contracts pneumonia.[297] Courts have frequently resorted to the ordinary/extraordinary distinction. While they have not always agreed on the meaning of this distinction,[298] the results of these cases have generally been consistent. They have permitted withdrawal of persistently vegetative patients from respirators because the treatment was "extraordinary."[299] Upon a determination of competence, the patients have been allowed to refuse surgical removal of gangrenous extremities.[300] Courts have not been consistent, however, in deciding whether artificial feeding devices are ordinary or extraordinary devices.[301] These cases require careful

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[295] COMMISSION REPORT, *supra* note 1, at 87.

[296] MISS. CODE ANN. § 41-41-113.

[297] *See* Capron, *supra* note 234, at 34 (discussing decisions denying treatment to terminally ill patients).

[298] *See* COMMISSION REPORT, *supra* note 1, at 83-87 (discussing various interpretations of distinction between ordinary and extraordinary treatment).

[299] *See, e.g.,* Severns v. Wilmington Medical Center, 421 A.2d 1334, 1350 (Del. 1980)(allowing husband to remove life-support from comatose wife); *In re* Quinlan, 355 A.2d 647, 671-72 (allowing discontinuance of extraordinary procedures sustaining life of noncognitive vegetative patient).

[300] *See, e.g.,* Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232, 1236 (1978)(competent 77-year-old widow allowed to refuse removal of gangrenous foot and leg); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785, 790 (1978)(competent 72-year-old patient allowed to refuse removal of gangrenous legs). *Cf.* Dept. of Human Servs. v. Northern, 563 S.W.2d 197, 211-12 (Tenn. Ct. App. 1978)(patient was found incompetent to decide whether to submit to surgery; thus her refusal to consent could be overriden if treatment was in her best interest).

[301] Two courts have held that withdrawal of artificial feeding devices was permissible under certain circumstances. *See* Barber v. Superior Court, 147 Cal. App. 3d 1006, 1023, 195 Cal. Rptr. 484, 493 (1983); *In re* Hier, 18 Mass. App. Ct. 200, 464 N.E.2d 959, 964 (1984). One court rejected that view. *See In re* Conroy, 190 N.J. Super. 453, 464 A.2d

analysis of the meaning of the distinction because withdrawal of such devices will guarantee imminent death with a certainty not necessarily present in other cases.[302]

While courts have not always been forced to settle the precise meaning of the distinction,[303] the decisions support the proportionate benefit distinction. For example, faced with a patient who needed a respirator to survive an allergic response to a bee sting, a court almost certainly would order treatment. It is almost inconceivable that the court would focus on the nature of the device. Its discussion would almost certainly focus on the patient's chance of full recovery.[304] Similarly, even though surgical removal of gangrenous extremities allows a patient a sapient existence, patients who have successfully resisted such treatment have been old and have expressed aversion to life as an invalid and little interest in life itself.[305] It is doubtful that courts would reach a similar result if a young person were faced with the decision, with the prospect of physical and psychological therapy that might permit a reasonably full life.[306] These various results are consistent not because of the therapy provided, but because of the benefits of the therapy to the patient.

Focus on proportionate benefits is consistent with the constitutional analysis adopted by the courts. For example, patients unable to form judgments about such medical decisions are enti-

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303, 315 (1983). That decision, however, was recently reversed by the New Jersey Supreme Court. 98 N.J. 321, 486 A.2d 1209, 1244 (1985).

[302] For example, Karen Ann Quinlan was able to survive several years free from a respirator, but was fed by artificial means. *See Living Wills Gain Acceptance*, *supra* note 213. She would obviously have expired within days had the artificial feeding device been terminated. For a discussion of this issue generally, see Capron, *supra* note 234.

[303] *See* COMMISSION REPORT, *supra* note 1, at 83-87 (discussing various interpretations given to ordinary/extraordinary distinction).

[304] *See In re* President of Georgetown College, 331 F.2d 1000, 1007 (D.C. Cir.)(court considered prospect of patient's full recovery in decision to permit hospital to give patient blood transfusions over her refusal to consent), *reh'g denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 1978 (1964).

[305] *See supra* note 300.

[306] *Compare* Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053, 1066 (1978), *with* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 435 (1977). In one instance the court ordered treatment for a young child suffering from acute lymphocytic leukemia; in the other, the court upheld a lower court order refusing to order treatment for a 67-year-old severely retarded patient suffering from acute myeloblastic leukemia. The chance of recovery was similar in the two cases.

tled to be treated in a manner consistent with their best interests.[307] A patient's interest cannot be discovered by reference to the nature of a medical device or a mechanism, but can be determined by analyzing the benefits which are promised by a particular treatment. Even a competent conscious patient who resists treatment may have that decision overridden by a sufficiently strong state interest.[308] Cases in which treatment has been compelled suggest that the court in fact balances the benefit of treatment to the patient. Further, courts have distinguished permissible refusal of treatment from suicide.[309] That distinction would seem to turn on the patient's prospects for full recovery if treated. Thus, if a court or legislature uses the extraordinary/ordinary treatment dichotomy, the dichotomy ought to be interpreted as referring to a balance of benefits that the treatment provides a patient.

The Mississippi Act is ambiguous on the meaning of "extraordinary" care. It is hoped that "extraordinary" treatment will be interpreted by reference to the proportionate benefits to the patient.

V. CONCLUSIONS

This article started from the premise that patients, health

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[307] *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)(blanket determination that abortions are not in best interests of minor absent parental consent held unconstitutional); Bellotti v. Baird, 443 U.S. 622, 651 (1979)(pregnant minor should be allowed to demonstrate that abortion is in her best interest where parental consent is denied); Custody of a Minor, 385 Mass. 697, 434 N.E.2d 601, 610 (1982)("no-code" order would serve best interests of infant suffering cyanotic heart disease).

[308] Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 426 (1977). One commentator has observed that such instances are rare. *See* Brant, *"Last Rights: An Analysis of Refusal and Withholding of Treatment Cases,"* 46 MO. L. REV. 337, 346 (1981)(discussing growth and development of refusal of medical treatment law).

[309] *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 426 (discussing instances where state's interests in preservation of life might outweigh individual's interest in exercise of free choice); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 664, 670 (stating that treatment is often ordered where chances of recovery are very good). *See also* Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978)(discussing state's interest in preservation of life), *aff'd*, 379 So. 2d 359 (Fla. 1980); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209, 1224 (1985)(stating that refusal of life-sustaining treatment may not be equated with suicide).

care providers, and courts have an interest in legislation which protects patients' rights and which minimizes the need for litigation.[310] Treatment decisions are more appropriately made by consultation than by litigation.

Mississippi's Natural Death Act avoids some of the pitfalls of earlier legislation. For example, it permits a declaration to be executed prior to a diagnosis of terminal illness and does not require periodic reexecution.[311]

Unfortunately, Mississippi's Natural Death Act also has some glaring deficiencies. For example, it does not provide guidelines where an incompetent patient has not executed a declaration.[312] It imposes an apparently stringent filing requirement and does not address the legal effect of a noncomplying declaration.[313] Further, in several aspects, the statute is ambiguous.[314] The Act will apply infrequently because it is so narrowly drafted.[315] A broader statute would more readily instruct patients and health care providers. The Act's narrow scope poses an even more serious problem: health care providers and courts may read the Act as the exclusive source of a patient's rights.[316] Construed in that manner, numerous patients will be forced to accept unwanted therapies that provide them no net benefit. It is hoped that counsel for health care providers and courts will recognize that a patient's constitutional right to privacy guarantees a patient's dignity and self-determination well beyond the narrow guarantee offered by the Natural Death Act of Mississippi.[317]

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[310] *See supra* notes 4-16 and accompanying text.

[311] *See supra* notes 122-33 and accompanying text.

[312] *See supra* notes 229-56 and accompanying text.

[313] MISS. CODE ANN. § 41-41-107(2).

[314] *See, e.g.*, notes 288-309 and accompanying text.

[315] *See* COMMISSION REPORT, *supra* note 1, at 143 (discussing limitations of many natural death statutes).

[316] *See id.* at 144.

[317] *See supra* notes 139-84 and accompanying text.

Mississippi Law Journal

Published by Students at the University of Mississippi School of Law

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COMMENT

CALIGULA WASN'T SO WRONG: TORT LIABILITY FOR DAMAGES CAUSED BY THE ATTRACTION OF CROWDS

I. Introduction

The emperor Caligula, upon witnessing some sort of irritating behavior on the part of one of the large crowds which were a feature of ancient Rome, is reported to have shown his exasperation by shouting "I wish that all of you Romans had only one neck!"[1] It may be inauspicious, and is certainly incongruous, to begin a legal essay with an epigram from one of history's most notorious criminal lunatics; yet anyone who has, through no design of his own, found himself encompassed by an inconvenient or disorderly crowd has probably been tempted to say that in this particular, Caligula may not have been as crazy as is generally supposed. The frustrating and potentially dangerous traits of crowds have been recognized throughout history. Juvenal commented bitterly on how the crush of the urban mob rendered the streets of Rome inhospitable and unsafe:

> Traffic gets in our way, in front, around, and behind us. Somebody gives me a shove with an elbow, or a two-by-four scantling. One clunks my head with a beam, another cracks down with a beer keg. Mud is thick on my shins, I am trampled by somebody's big feet, now what?—a soldier grinds his hobnails into my toes. Don't you see the mob rushing along to the handout?[2]

A millenium of intervening civilization did little to alleviate the unpleasant aspects of crowds. Samuel Johnson was plagued by them in Augustan London:

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[1] G. Suetonius, Lives of the Twelve Caesars: *Caligula* 165 (R. Graves trans.1957).
[2] Juvenal, Satires, III, 42, lines 244-48 (R. Humphries trans. 1958).

> But hark! th' affrighted crowd's tumultuous cries roll through the streets, and thunder to the skies.[3]

Crowds are almost always noisy; their mere presence can block access to entire neighborhoods, or to strategic locations within them; they can spill out of the bounds of the public thoroughfares and invade private property. People in crowds are disposed to acts they would never consider while acting singly, and a surly or disorderly crowd clearly has the capacity to inflict grievous damage on people and property in its path. Even when a crowd appears well-disposed, its proximity can be a source of anxiety to those nearby, for the mutability of crowds is proverbial. All who are juxtaposed with a crowd experience, to some degree, the fear of future damage, even where no actual damage is being inflicted. In short, it is hard to disagree with the English aphorist Lord Halifax, who said: "There is an accumulative cruelty in a number of men, though none in particular are ill-natured."[4]

Given the acknowledged evils which crowds can bring in their train, it is surprising that the law has had relatively little to say about them. This is undoubtedly due in large measure to the common-sense realization that crowds neither can nor should be eliminated from society altogether, and that people ought to learn to live with them—at least under ordinary circumstances. Yet it is just as obvious that circumstances can arise in which the law cannot take so benign a view of crowds, or of those who cause them to gather. This essay proceeds on the assumption that the law should provide some remedy for people needlessly damaged or annoyed by crowds, and will examine the appropriateness of various expedients toward that end. Its emphasis will be on private harms rather than on the interests of government. Public aspects of crowd control will be discussed in passing when they relate to the plight of the aggrieved individual. The needs and problems of such people are illustrated by a recent and egregious example of trouble caused by an unwanted concourse of people.

II. Rodrigue v. Copeland: A Cautionary Tale

Metairie, Louisiana, is a large residential suburb inhabited chiefly by white-collar and professional people who make their livings in adjacent New Orleans. "Bedroom communities," as their nickname implies, tend to place a high premium on comparative peace and quiet. The

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[3] S. Johnson, *London: A Poem*, in The Complete Poems of Samuel Johnson (N. Smith & E. McAdam ed. 1974).

[4] G. Savile, Lord Halifax (attributed).

residents of fashionable Folse Drive in Metairie were therefore somewhat nonplused at the course charted by one of their neighbors, Al Copeland, in the Christmas season of 1977. When they looked in the direction of Copeland's house, they saw what they considered Tartarean sights. Copeland had elected to celebrate the Nativity by putting up a spectacular set of decorations, including, *inter alia*, "an illuminated 18-foot Santa and reindeer, palm trees swathed with lights, and amplified Christmas carols."[5]

Copeland's garish taste in the visual arts was not the chief concern of the inhabitants of the neighborhood.[6] Their complaints centered on the fact that others—many, many others—also found the display attractive. Suddenly, thousands of people were driving through their neighborhood streets to see Copeland's decorations.[7] One of his immediate neighbors, Mrs. Jerrie Klein, estimated that a quarter of a million people had passed before her house during the holiday season of 1982 alone.[8] Traffic congestion became a serious problem, as one neighbor complained: "It takes 45 minutes to get from West Esplanade to my house (a distance of one mile)."[9] The presence of the crowds, however, was not the only problem; there was also the matter of their behavior, which was summarized by Mrs. Mary Burrell in this fashion: "They come to party and we go out the next morning and pick up the trash."[10] The morning's accumulation of debris usually included "beer cans and candy wrappers strewn on the street."[11] Nor were the visitors content to confine their depredations to the street; residents reported that they frequently left their cars and roamed the area, occasionally pounding on the doors of the houses.[12] Worst of all, perhaps, was their practice of using the residents' lawns as public lavatories. This last abuse grew to such proportions that one homeowner, at his own expense, installed a portable toilet on his lawn, so that his shrubbery

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[5] *Christmas Decor of Chicken King Ruffles Feathers*, Times-Picayune (New Orleans), Dec. 3, 1983, § 1, at 15, col. 1 [hereinafter cited as *Chicken King Ruffles Feathers*] (Al Copeland is the proprietor of Popeye's, Inc., a popular chain of fast food restaurants specializing in fried chicken).

[6] Indeed, most of the witnesses at trial admitted that they found the display "beautiful." Rodrigue v. Copeland, No. 289-098, C/W 289-142, slip op. at 2 (24th Jud. Dist. Jefferson Parish, La., Dec. 15, 1983).

[7] *Chicken King Ruffles Feathers, supra* note 5.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

would be spared the unwelcome attentions of the wanderers.[13]

This went on for six years; unofficial remonstrations could extract no concessions from Copeland beyond an offer to buy ropes with which his neighbors could barricade their yards.[14] As the holiday season of 1983 approached, approximately one hundred area residents decided that the time had come for more drastic measures. They filed a suit in the Circuit Court of Jefferson Parish asking for a preliminary injunction against the lights. They argued that the display violated parish zoning ordinances, and that they were "deprived of the normal use of their property during the six weeks the display is up, and as a result are 'rendered captives' of Copeland."[15]

Judge Alvin C. Eason heard the petitioners' case and was unsympathetic. Observing that the sheriff had instituted certain traffic control measures "which ease considerably any traffic congestion,"[16] Eason concluded that the congestion was therefore insufficient to warrant injunctive relief.[17] He chided the petitioners for their unwillingness to bear problems "clearly akin to the traffic congestion created by parades at Carnival which cause similar inconvenience . . . and certainly is one of the 'customs of the place.' "[18] He ruled that "the evidence does not show a nuisance, but mere inconvenience . . . ," and denied the injunction.[19] The petitioners appealed the denial to the Louisiana Court of Appeals, Fifth Circuit.

Their appeal received short shrift. The appeals court was not entirely unsympathetic to them; indeed, it was inclined to agree that before the sheriff had intervened, the petitioners' allegations "seemed to be well-founded."[20] But since the appeals court did not have before

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[13] *Copeland Can Keep Basking in Yule Lights*, Times-Picayune (New Orleans), Dec. 16, 1983, § 1, at 25, col. 1.

[14] *Chicken King Ruffles Feathers, supra* note 5. Those who have observed how effective ropes are in repelling crowds may, perhaps, think Copeland's gesture less than magnanimous.

[15] *Neighbors Sue Owner of Popeye's Over Lights*, Times-Picayune (New Orleans), Dec. 1, 1983, § 1, at 19, col. 5.

[16] Rodrigue v. Copeland, No. 289-098, C/W 289-142, slip op. at 2 (24th Jud. Dist. Dec. 15, 1983).

[17] *Id.*

[18] *Id.* Copeland had raised this argument before the trial, asserting that if the Mardi Gras and the Sugar Bowl should not be shut down, then neither should he. *Neighbors Sue Owner of Popeye's Over Lights, supra* note 15. Mrs. Klein retorted that Mardi Gras lasted only a week, whereas Copeland's display was up for six weeks. *Chicken King Ruffles Feathers, supra* note 5.

[19] *Rodrigue*, slip op. at 2-3 (24th Jud. Dist. Dec. 15, 1983).

[20] Rodrigue v. Copeland, No. 83-C-855, slip op. at 2 (La. Ct. App. Dec. 22, 1983).

it the transcript of the hearing below, or a copy of the rules the sheriff had devised, it found itself without a basis for holding that the judge below had abused his discretion.[21] Moreover, since by this time Copeland had already erected the display, a preliminary injunction would no longer have been of any avail to halt construction.[22]

The petitioners were inclined to pursue the matter further, but by the time their petition reached the Supreme Court of Louisiana, the holidays were over and the court apparently saw no need to consider the affair.[23] Since the problem, in all likelihood, was going to recur, the neighbors were reported discussing another attempt next year.[24]

The result in *Rodrigue* seems most unfortunate. Apparently the parish judge took no account of the obvious differences between residential areas like this one and comparatively hardened areas like the French Quarter which historically have borne the brunt of New Orleans' Mardi Gras celebration. He also seems to have forgotten the fact that Mardi Gras is vital to the area's economy, while Copeland's lights have no comparable civic utility. Nor does it appear sound to ignore the disparity between the durations of the two events. There are other reasons, however, for tort lawyers to regret the fact that the most significant recent case involving crowd damage arose in Louisiana—reasons which go beyond the creole insouciance of one particular judge.

Louisiana is proud of its civil law heritage, which channels actions

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[21] *Id.*, slip op. at 1-2.

[22] *Id.*, slip op. at 1.

[23] Rodrigue v. Copeland, 444 So. 2d 128 (La. 1984)(mem.)(denial of supervisory writs). The court noted that the plaintiffs still were entitled to seek a permanent injunction. *Id.*

[24] As the 1984 Christmas season approached, Copeland announced plans to expand the display even further. *Copeland Adds Flying Santa to Ninth Annual Extravaganza*, Times-Picayune (New Orleans), Nov. 30, 1984, at A-21 (Jefferson section), col. 2. The neighbors again filed their bill, but Judge Eason, adhering to his position of the previous year, refused to enjoin the display. He did, however, require Copeland to shut off the display at 11 o'clock each night and to dismantle it after December 30. Copeland appealed these restrictions. *Copeland Appeals Restrictions on Christmas Light Display*, Times-Picayune (New Orleans), Dec. 12, 1984, at A-34, col. 6. The Louisiana Fifth Circuit Court of Appeals denied his request for an emergency hearing on the matter. *Yule Light Hearing Bid Denied*, Times-Picayune (New Orleans), Dec. 13, 1984, at A-6, col. 6. Copeland then sought a temporary restraining order against the state court from the United States District Court (E.D. La.), but Judge Robert Collins refused to issue it. *Copeland Lights Go Out Dec. 30*, Times-Picayune (New Orleans), Dec. 22, 1984, at A-20 (St. Bernard section), col. 5. Copeland's state appeal was taken under advisement by the Louisiana Fifth Circuit Court of Appeals the next month. *Copeland Appeals Rulings*, Times-Picayune (New Orleans), Jan. 8, 1985, at A-15 (East Jefferson section), col. 1.

for infringement of property rights into a framework significantly different from those governing similar actions in common-law jurisdictions. Theoretically, such actions in Louisiana are controlled not by nuisance theories, but rather by statutes concerning predial servitudes. Thus, in Louisiana, an action which would sound in tort elsewhere is encrusted with Napoleonic property considerations.[25] The situation is further complicated by the sparseness of applicable civil-law precedent.[26] When Louisiana courts make use of common-law nuisance concepts, they are very circumspect; they characteristically insist that they are merely employing them as adjuncts to the civil-law principles embodied in the statutes.[27] All of this tactful judicial language has not sufficed to prevent some lively arguments among Louisiana scholars over the extent to which common-law ideas have infiltrated their jurisprudence.[28] With such winds of doctrine blowing, it is small wonder

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[25] The pertinent statutes are LA. CIV. CODE ANN. art. 667-68 (West 1980). Article 667 states that "[a]lthough a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of damage to him." This is neatly offset by Article 668, which provides in pertinent part that "[a]lthough one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor." These two articles, taken together, are the Symplegades between which the petitioners in *Rodrigue* were crushed. *See Rodrigue*, slip op. at 2 (24th Jud. Dist. Dec. 15, 1983). The parish judge also made mention of LA. CIV. CODE ANN. art. 669 (West 1980), which prohibits certain uses producing "smoke or nauseous smell." *Id.* It is difficult to see how this article is directly applicable to the facts in *Rodrigue*.

[26] A leading authority admits that Louisiana courts have been forced to borrow common-law nuisance concepts because "French doctrine and jurisprudence could furnish little guidance in the field. . . ." A. YIANNOPOULOS, 4 LOUISIANA CIVIL LAW TREATISE: PREDIAL SERVITUDES § 53, at 156 (1983).

[27] Thus, in a leading case, the Louisiana Supreme Court insisted that any action of this genre is "not one in tort, but, rather, one that springs from an obligation imposed upon property owners by the operation of law. . . ." Devoke v. Yazoo Miss. Valley R.R., 211 La. 729, 30 So. 2d 816, 821 (1947). Similarly, a later decision referred to common-law nuisance concepts as "persuasive," but not decisive. Fredrick v. Brown Funeral Homes, 222 La. 1, 62 So. 2d 100, 111 (1952). One commentator has noted that Louisiana courts speak of "nuisance" in the sense of "a descriptive term to denote a violation of the obligations of vicinage, rather than in its common-law sense of a field of liability." A. YIANNOPOULOS, *supra* note 26, § 53, at 157 n.5.

[28] Professor Stone of Tulane observed that another commentator seemed "quite willing to capitulate to the common law." Stone, *Tort Doctrine in Louisiana: The Obligations of Neighborhood*, 40 TUL. L. REV. 701, 708 n.42 (1966). Professor Malone of Louisiana State University has been less hostile to the use of tort concepts in this field; indeed, he considers them more useful than the "anomalous" articles of predial servitude. Malone, *The Work of the Louisiana Appellate Courts for the 1969-1970 Term: Torts*, 31 LA. L. REV. 231, 231 (1971). Professor Malone lists a number of articles discussing the

that "Louisiana courts expressed divergent views concerning the nature of responsibility" under the articles.[29] The state courts have held that an action under the articles will lie for excessive noise,[30] earth-moving activities,[31] maintenance of a slaughterhouse,[32] and operation of a land farm.[33] On the other hand, they have denied relief in cases involving the maintenance of a parking lot,[34] neglect which permitted weeds to grow to excessive heights,[35] failing to control the spread of vines planted on one's own property,[36] moisture emanating from a planter,[37] installing automatic bank tellers,[38] operating a tramway through a residential neighborhood,[39] and operating a night club.[40] Decisions in this area will almost necessarily have an ad hoc flavor about them, since the justification of a land use will vary according to the circumstances, but the civil-law setting of Louisiana does seem to have exacerbated the problem.

A particularly disturbing aspect of the Louisiana system is that it can allow erratic allocations of the parties' burdens. A striking example of this is found in *Robichaux v. Huppenbauer*.[41] Huppenbauer was keeping a stable in a residential district of New Orleans. The court had no difficulty with the idea that such a use was obnoxious. Yet it refused to enjoin its operation altogether: "[W]e have not been shown

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proper scope of the operation of article 667. *Id.* at n.1.

[29] A. YIANNOPOULOS, *supra* note 26, § 36, at 100.

[30] *See, e.g.*, Easterly v. Carr, 361 So. 2d 279, 282-83 (La. Ct. App. 1978)(motorcycles); Beauvais v. D.C. Hall Transport, Inc., 49 So. 2d 44, 46-47 (La. Ct. App. 1950)(truck terminal).

[31] *E.g.*, Ernest v. H. H. Burstein Enters., Inc., 379 So. 2d 852, 853 (La. Ct. App. 1980)(landowner's changing level of his property resulted in drainage onto neighbor's land).

[32] *E.g.*, Billeaudeau v. Jeansonne, 149 So. 183, 184 (La. Ct. App. 1933)(annoyance to farmer 250 feet away).

[33] McCastle v. Rollins Environmental Servs. of La., Inc., 415 So. 2d 515, 519 (La. Ct. App. 1982).

[34] City of New Orleans v. L'Enfant, 126 La. 455, 52 So. 575, 579 (1910).

[35] Wright v. Travelers Ins. Co., 288 So. 2d 374, 376 (La. Ct. App. 1974)(where weeds obstructed bicyclist's view at intersection, question of nuisance was inapplicable in determining liability of landowner to bicyclist for injuries sustained in collision with automobile).

[36] Borenstein v. Joseph Fein Caterers, Inc., 255 So. 2d 800, 805-06 (La. Ct. App. 1971)(lessor not excused but tenant not held liable).

[37] *Id.* at 804.

[38] Adrouny v. International Bank & Trust Co., 266 So. 2d 524, 525 (La. Ct. App. 1972)(mere "inconvenience," despite traffic congestion).

[39] Morris v. Putsman, 166 La. 14, 116 So. 577, 579 (1928).

[40] Thornburg v. McMillin, 392 So. 2d 1119, 1124 (La. Ct. App. 1980).

[41] 258 La. 139, 245 So. 2d 385 (1971).

that it is impossible to maintain this horse lot and stable in such a manner as to free it from the complaints which the plaintiffs make. . . ."[42] The court prescribed certain palliative measures, and left it up to the plaintiffs to sue again later should the measures prove inadequate.[43] The parish judge in *Rodrigue* did not cite *Robichaux*, but his opinion seems animated by a similar spirit inasmuch as it implicitly gave the petitioners the burden of showing that the control measure devised by the sheriff would not work—something they could hardly have done until it was too late.

One hesitates to write effusive and hackneyed words in praise of the genius of the common law. Yet the Louisiana experience demonstrates the difficulty of dealing with land-use disputes according to a set of property statutes. The common law allows the courts more latitude in balancing the diverse interests involved.

III. Zoning Ordinances: The Limits Of Blunt Instruments

Abuses of the type normally associated with crowds can, to a degree, be combatted prospectively through zoning ordinances forbidding certain enumerated uses of land. A major advantage of such laws is their relative immunity from judicial challenges. Courts are, as a rule, deferential to legislatively enacted zoning provisions.[44]

Nonetheless, this advantage is offset by factors making it highly unlikely that zoning ordinances can provide adequate relief for crowd-related injuries unless supplemented and illumined by a substantial body of common-law tort precedent. The most obvious limitation of zoning is that its scope is necessarily general.[45] Zoning can proscribe the erection of certain structures in a given area, and describe the overall character of a neighborhood, but in the nature of things it cannot exhaustively enumerate and interdict obnoxious land uses. The permutations of human "cussedness" are simply too numerous to be so catalogued. The mere fact, for example, that an area is zoned residential will hardly suffice to get rid of irritants. There are many annoying uses

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[42] *Robichaux*, 245 So. 2d at 390.

[43] *Id.*

[44] In the leading U.S. Supreme Court case on zoning, Justice Sutherland said flatly that "if the validity of the legislative classification for zoning be fairly debatable, the legislative judgment must be allowed to control." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

[45] An early commentator on zoning remarked that such ordinances are "based on the broadest principles of public welfare controlled by the police power. . . . They naturally have broader scope than nuisance regulation(s). . . ." Note, *Nuisance Regulations as Distinct from Zoning Ordinances*, 17 Va. L. Rev. 202, 203-04 (1930).

of land which are not in the least commercial. Some people think they are not really living unless they have a loud stereo.

Another difficulty is that in the drafting of zoning ordinances, an element of subjectivity is bound to creep in. The boundary between uses which are insufferable and uses which must be borne is not always starkly visible. Justice Sutherland spoke of this problem in the Supreme Court's first major zoning case: "[I]n some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation."[46] The practical effect of this difficulty has been felt by those who have tried to use zoning as a means to improve a community's appearance.[47] There may be differences between assessing the "beautiful" and evaluating the appropriateness of a land use, but they would seem to be of degree rather than kind. In tort law, the courts have adjusted to this problem by fashioning a serviceable construct: the Person of Ordinary Sensibilities. This worthy is first cousin to the Reasonable Person of Ordinary Prudence, who has been so helpful in the law of negligence. He provides a standard against which the finder of fact can measure the harm inflicted by the questioned use.[48] Since juries will differ in their assessments of what a "normal" person is obliged to endure, it would be idle to suppose that the device disposes of the problem of subjectivity altogether. It can, *faute de mieux*, provide tort law with a certain center of gravity, and prevent the emergence of wildly divergent standards. Courts have variously described this fictitious character and the evils he is willing to put up with,[49] but most of the descrip-

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[46] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926).

[47] One commentator dolefully concluded that "legislative attempts to regulate enviromental ugliness have proved ineffective, both through zoning and otherwise. . . ." Comment, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075, 1087 (1970). The problem of subjectivity was described with a different emphasis by another advocate of such ordinances. "A concern for aesthetics," he opined, "has political implications. The basic political question is who decides what and how? More specifically, who decided what are the problems involving urban beauty?" Newsome, *Zoning for Beauty*, 5 NEW ENG. L. REV. 1, 15 (1969).

[48] The need for such was well expressed by Dean Prosser: "[S]ome other standard must obviously be adopted than the personal tastes, susceptibilities and idiosyncrasies of the particular plaintiff." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 87, at 578 (4th ed. 1971).

[49] *See, e.g.*, Dorsett v. Nunis, 191 Ga. 559, 13 S.E.2d 371, 373 (1941)("holy roller" meeting; standard was "ordinary person rather than one of abnormal sensibilities and feelings"); Meeks v. Wood, 66 Ind. App. 594, 118 N.E. 591, 592 (1918)(whistle; standard is "normally constituted people"); Wade v. Miller, 188 Mass. 6, 73 N.E. 849, 849 (1905)(chicken farm not offensive to "persons of ordinary health and sensitiveness"); Rogers v. Elliott, 146 Mass. 349, 15 N.E. 768, 772 (1888)(invalid disturbed by church

tions seem conformable to the requirement proposed by the American Law Institute: "The question is not whether the plaintiff or defendant would regard the invasion as unreasonable, but whether reasonable persons generally . . . would consider it unreasonable."[50]

It has been suggested that the framers of zoning laws should recognize the indispensibility of common-law nuisance as a guide. "In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which is the foundation of so much of the common law of nuisance, ordinarily will furnish a helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power. . . ."[51] But is this not the same as admitting obliquely that zoning ordinances can never fully supplant the common law in this field?

In addition to theoretical objections, there are mechanical problems as well. For one thing, a court is not obliged to enjoin something as a nuisance merely because it contravenes a zoning law.[52] Nor is it by any means certain that the appropriate governmental body will have the authority to act against the questioned use.[53]

A further difficulty relates to the availability of defenses. A plaintiff who relies on zoning ordinances risks having the door opened for the use of various defense arguments about the application of the laws. This is precisely what happened in *Rodrigue*. There the petitioners alleged zoning violations and were confronted with evidence tending to

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bells not one of "ordinary people in the vicinity"); Excelsior Baking Co. v. City of Northfield, 247 Minn. 387, 77 N.W.2d 188, 193 (1956)(single call by salesmen not offensive to "persons of ordinary tastes and susceptibilities"); Dunlop v. Daigle, 444 A.2d 519, 520 (N.H. 1982)(dog kennel; standard is "customary interferences land user suffers in organized society"); First Methodist Episcopal Church v. Cape May Coal & Grain Co., 73 N.J. Eq. 257, 67 A. 613, 614 (1907)(standard not set by "fastidious or overrefined" person).

[50] RESTATEMENT (SECOND) OF TORTS § 826 comment c (1979).

[51] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926).

[52] *See, e.g.*, B & W Management, Inc. v. Tasea Investment Co., 451 A.2d 879, 882 n.7 (D.C. App. 1982)(parking garage not nuisance per se, though forbidden by zoning law). *But see* Little Joseph Realty, Inc. v. Town of Babylon, 41 N.Y.2d 738, 395 N.Y.S.2d 428, 433, 363 N.E.2d 1163, 1168 (1977)(asphalt plant violated zoning law; nuisance per se).

[53] This problem is illustrated by Berkeley County Comm'n v. Shiley, 295 S.E.2d 924 (W.Va. 1982). Shiley had been promoting rock concerts on his farm for several years, and many of the local residents complained about the crowds and the traffic congestion. The Berkeley County Commission passed a resolution to abate the concerts, but the court held that in West Virginia, county commissions have no statutory authority to proscribe such uses absent a showing of harm to public health. *Shiley*, 295 S.E.2d at 926.

show that other violations had been widely tolerated in the parish.[54]

Economic factors also militate against the use of zoning in the context of a crowd-related action. The promoter of a rock concert, for example, may expect a profit so handsome that a fine for violating a zoning ordinance would do little to deter him.[55] In a time of tight budgets, local governments may be unwilling to shoulder the additional financial burden of combatting noxious land uses.[56]

From the foregoing, it will be apparent that while zoning ordinances certainly have their place in a scheme of land-use controls, they can never entirely replace common-law remedies in preventing and redressing the kind of abuse envisioned by this essay. It remains to be asked, however, which action is the most promising vehicle for such claims.

IV. The Limits Of Trespass

An obvious danger to be apprehended from crowds is that they will overflow the streets and (to use the quaint language of the old common-law writ) "tread down the grass with their feet"—that they will, in other words, commit the tort of trespass to the plaintiff's land. In cases involving crowds, it will always be difficult, at best, to identify and seize the people who actually enter the land. Therefore, it would be expedient for the injured person to have some action against the person who caused the crowd to gather, provided that his identity can be ascertained. Herein lies the chief problem with the use of trespass in crowd-damage situations: Whether, and under what conditions, a person can be liable to a plaintiff for trespass committed by third parties?

The leading case involving what may be called "inducement to

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[54] John Boudreaux, Jefferson Parish's director of code enforcement, was forced to admit at the hearing that the zoning ordinances invoked by the petitioners, if stringently enforced, would have banned almost every front-yard Christmas display in the parish. This bolstered Copeland's defense that the laws were being selectively enforced. *Parish Winks at Illegal Santas, Lawyer says in Display's Defense*, Times-Picayune (New Orleans), Dec. 7, 1983, sec. 3, at 16.

[55] Comment, *Rock Festivals and Nuisance*, 25 Ark. L. Rev. 362, 362-63 (1971).

[56] One commentator points out that "since zoning inevitably results in considerable prevention and administrative costs, large reductions in nuisance costs would have to be forthcoming for zoning to be deemed efficient." Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 693 (1973). This writer proposes the establishment of decentralized "nuisance boards" to handle local disputes. *Id.* at 778. Since some sort of judicial review of the findings of such boards would presumably be necessary, these boards probably would achieve little beyond delaying the judicial resolution of such disputes.

trespass" is *Guille v. Swan*.[57] Charles Guille ascended in a balloon over the City of New York. Upon his descent, he somehow lost his balance and wound up dangling from the basket of his conveyance "in a very precarious situation." Seeing a laborer at work in Swan's nearby garden, he called for help. The balloon landed in the garden, much to the detriment of Swan's "potatoes and radishes." Unfortunately for Guille (who had not been injured), his call for help had been heard by "more than two hundred persons." Seeing his plight, these Good Samaritans rushed to give their aid. In so doing, they "broke into Swan's garden through the fences, and came onto his premises, beating down the vegetables and flowers. The damage done by Guille, with his balloon, was about $15, but the crowd did much more."[58]

Needless to say, Guille was held to account for his own intrusion. The court, however, went further and held him liable for the damage inflicted by those he had drawn onto the land, on the principle laid down in the famous "squib case"[59] that "the act of the individual to be charged, ordinarily and naturally produced the acts of the others."[60]

Guille has never been expressly overruled, and is still technically good law today. Nevertheless, courts and commentators have never been comfortable with it. The New York Supreme Court applied the rule of *Guille* to a case in which a person entered the plaintiff's land to retrieve a mill owned by the defendant. The latter was held liable for the trespass, since he had authorized an "unlawful interference with the plaintiff's land."[61] Later in the century, however, the courts began a surreptitious retreat from the rule of *Guille*, at least insofar as it related to third-party trespass. In 1866, New York's highest court made a rather absurd attempt to distinguish *Guille* in a case which was to become a landmark in the development of doctrines of proximate cause. Ignoring the plain language of the decision, the court asserted that liability had attached in *Guille* because the defendant had "intentionally descended into the plaintiff's garden and *invoked the aid of the multitude.*"[62] The rule of *Guille* continued to be invoked by some

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[57] 19 Johns. 381, 10 Am. Dec. 234 (N.Y. Sup. Ct. 1823).

[58] *Guille*, 19 Johns. at 381.

[59] Scott v. Shepherd, 3 Wils. 403, 95 Eng. Rep. 124 (K.B. 1773).

[60] *Guille*, 19 Johns. at 382. Chief Justice Spencer elaborated: "Now if his descent under such circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity or for the purpose of rescuing him from a perilous situation; all this he ought to have foreseen, and must be responsible for." *Id.* at 383.

[61] Wall & Wall v. Osborn, 12 Wend. 39, 39 (N.Y. Sup. Ct. 1834).

[62] Ryan v. New York Central R.R., 35 N.Y. (8 Tiff.) 209, 215 (1866)(emphasis added). This in the face of the language of *Guille*: "Whether the crowd heard him call

courts,[63] but gradually it came under fire from legal scholars.[64] In a turn-of-the-century case involving a maritime injury, a New York court sharply criticized *Guille*, which, it was said, "perilously extended" liability for trespass. "The quarrel," said the court, "is . . . with that reasoning of the court which is based upon the fact that the crowd might be regarded as curiosity mongers."[65] So it was that at length the rule of *Guille* slipped into a kind of legal limbo.[66] Citations to *Guille* today almost always pertain to the issue of liability for trespass to airspace.

The checkered history of the rule of *Guille* is instructive because it illustrates the reluctance of courts to extend liability for trespass beyond its traditional bounds. The core of the action of trespass to land is the requirement that the tortfeasor must either break the close himself, or incontrovertibly cause someone or something else to do so. This requirement has made trespass a comparatively inelastic tort; courts have tended to resist any suggestion that they should liberalize their rules of causation. In describing the marked reluctance of courts to adopt theories of "transferred intent" in trespass, Dean Prosser noted a tendency to restrict the tort to "forcible, direct and immediate harms."[67] When one examines cases of trespass involving the entry of foreign objects or third parties, a similar impression emerges. No substantial and uncontradicted body of law teaches that trespass may lie for entries caused by the defendant merely in some general sense.

At first glance, this assessment may seem unduly pessimistic. There are cases describing liability for trespass in language sweeping to the point of grandiloquence.[68] Moreover, there are some cases in which we find the requirements of causality and intent construed broadly. In

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for help or not, is immaterial." *Guille*, 19 Johns. at 383.

[63] *See, e.g.*, State v. Smith, 78 Me. 260, 4 A. 412, 413 (1886)(unauthorized entry of lumberjacks onto plaintiff's land at defendant's request, which "naturally and ordinarily produced the acts complained of").

[64] A leading treatise disparaged *Guille*'s third-party trespass holding, asserting that "it has been condemned, on satisfactory grounds." T. SHEARMAN & A. REDFIELD, ON THE LAW OF NEGLIGENCE § 35 (5th ed. 1898)(citing WHARTON, NEGLIGENCE § 95).

[65] Trapp v. McClellan, 68 A.D. 362, 74 N.Y.S. 130, 133 (1902).

[66] Its ghost still walks occasionally. *See, e.g.*, Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249, 250-51 (1954)(trespass lay when intrusion was "immediate or inevitable consequence" of defendant's act). *Accord*, Margosian v. U.S. Airlines, Inc., 127 F. Supp. 464, 466 (E.D.N.Y. 1955). Both of these cases, however, involved the entrance of foreign objects rather than third parties.

[67] Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 651 (1967).

[68] *See, e.g.*, Cawthon v. Williams, 107 Ga. App. 886, 132 S.E.2d 214, 215 (1963)(wrongful entry at defendant's request; "in trespass cases all are principals").

Dial v. City of O'Fallon,[69] a case involving a sewage overflow, the court uttered dicta suggesting that trespass would lie for causing the entry of a third person, even through mere negligence.[70] In cases involving particulate emissions or other foreign objects, some courts have shown a willingness to resolve questions of intent by employing "substantial certainty" analysis.[71] Situations involving the removal of barriers with resultant invasion of the plaintiff's property by the defendant's animals constitute a special class of cases in which recovery has generally been allowed.[72] In one instance, a neighbor was held liable for enabling wild animals to enter the plaintiff's land.[73]

These cases seem to bode well for recovery for trespass by crowds. Yet there is a countervailing body of law which demands a closer relation between the defendant and the actual entry. In *Vandenburgh v. Truax*,[74] a man brandishing a knife pursued a small boy into a store. The frightened youngster upset and damaged some of the merchant's goods. The adult who gave chase was held liable for the damage, the court laying great stress on the immediate effect of his behavior. Cases may be found which assert that any entry, whether by the defendant or by others, must be made "for [the defendant's] own purposes,"[75] or that the defendant must be guilty of "personal cooperation in the

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[69] 81 Ill. 2d 548, 411 N.E.2d 217 (1980).

[70] *Dial*, 411 N.E. 2d at 222. *See also, e.g.*, Kirby Lumber Corp. v. Karpel, 233 F.2d 373, 375 (5th Cir. 1956)(applying Texas law; timber cutters, personal participation not necessary for liability); Kapson v. Kubath, 165 F. Supp. 542, 551 (W.D. Mich. 1958)(warrantless gambling raid; liability for all who "instigate, command, encourage, advise, ratify or condone" entry); Burns v. Horkan, 126 Ga. 161, 54 S.E. 946, 947 (1906)(timber cutters; all who "wrongfully contribute" liable); State v. Lasiter, 352 S.W. 2d 915, 916 (Tex. Civ. App. 1961)(sewage workers; liability for "causing or permitting" entry); Zimmer v. Stephenson, 403 P.2d 343, 346 (Wash. 1965)(spark-emitting tractors; equal liability for one who causes "thing or third person so to enter").

[71] *See, e.g.*, Borland v. Sanders Lead Co., 369 So. 2d 523, 530 (Ala. 1979)(lead particles deposited "with reasonable foreseeability"); Roberts v. Permanente Corp., 10 Cal. Rptr. 519, 521 (Cal. App. 1961)(cement dust; liability for acts which will, "with substantial certainty," cause entry); Lunda v. Matthews, 46 Or. App. 701, 613 P.2d 63, 66 (1980)(cement dust; "acts setting in motion the invasion were done with knowledge that a trespass would result").

[72] Dean Prosser says flatly that in such cases "the consequences have obviously been quite foreseeable and hence recoverable under the ordinary rules of proximate cause." Prosser, *Transferred Intent, supra* note 67, at 660.

[73] Brackett v. Bellows Falls Hydro-Electric Corp., 87 N.H. 173, 175 A. 822, 823 (1934). In this case, the defendant flooded the plaintiff's land. This condition attracted muskrats, which inflicted additional damage with their burrowing. The defendant was held liable for damage by both the water and the rodents.

[74] 4 Denio 464 (N.Y. Sup. Ct. 1847).

[75] Allstate Fire Ins. Co. v. Singler, 14 Ohio St. 2d 27, 236 N.E.2d 79, 81 (1968).

wrongful act."[76] One court held that there could be no liability for a vicarious trespass unless there was a master-servant relation between the defendant and the trespasser;[77] another held that the plaintiff must prove that the defendant did not only permit the trespass, but that he must "command, encourage or direct" it.[78] One plaintiff was told that he was obliged to prove that the defendant had given his "assent, or ratification" to the trespass, even though the intruders had told him that they were acting in the defendant's name.[79] One court went so far as to say that there could be no liability absent some act by the defendant on the plaintiff's land.[80]

The apparent opposition between the two sets of cases dissolves when one takes a closer look at the group which appears to sanction liberal recovery. Some involve the entry of persons who were employed by the defendant, or who were directly entreated or ordered by the defendant to enter the plaintiff's land. Others involve animals owned by the defendant, foreign objects deposited by him, or particulate emissions which settled onto the plaintiff's land because of some enterprise of the defendant. These cases, though factually disparate, seem to have one feature in common: they involved the entry of a person or thing over which the defendant had exercised a relatively high degree of control.

The authors of the *Restatement* seem to have recognized the presence of this element, for they employ this conservative language in speaking of the right of recovery for trespass by third parties:

> If, by any act of his, the actor *intentionally causes* a third person to enter land, he is as fully liable as though he himself enters. Thus, if the actor has *commanded or requested* a third person to enter land in the possession of another, the actor is responsible for the third person's entry if it be a trespass. This is an application of the general principle that one who intentionally causes another to do an act is under the same liability as though he himself does the act in question.[81]

It may not be without significance that the American Law Institute chose not to insert any language to the effect that liability would be imposed for an entry which was the "natural" or "foreseeable" result

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[76] Vidal v. Town of Errol, 86 N.H. 1, 162 A. 232, 238 (1932).
[77] McGuire v. Grant, 25 N.J. (1 Dutch.) 356, 67 Am. Dec. 49, 58 (1856).
[78] Stephens v. Schadler, 182 Ky. 833, 207 S.W. 704, 705 (1919).
[79] Fox v. Jackson, 8 Barb. 355, 357 (N.Y. Sup. Ct. 1850).
[80] Feiges v. Racine Dry Goods Co., 231 Wis. 270, 285 N.W. 799, 801 (1939).
[81] RESTATEMENT (SECOND) OF TORTS § 158 comment j (1965)(emphasis added).

of some act of the defendant. This omission is all the more striking because, language of this type, in the form of "substantial certainty" analysis, *was* included in the comment on entry by foreign objects.[82] The framers, along with most courts, seem to have contemplated a tort with a need for a greater showing of immediacy and control in cases involving entry by third parties. That is as it should be, for human beings (unlike animals or inanimate material) are free agents, and the law ought not lightly to presume that their responsibility for their deeds can be imputed to another.

The essential attributes of trespass, then, present serious obstacles to its use as a vehicle for redressing crowd-related injuries. Moreover, its employment as a discrete tool is not really necessary. Trespass, like many other torts, has a substantial area of overlap with nuisance. It is highly likely that in whatever cases trespass would be available for such injuries, nuisance would lie also.[83]

V. Return To The "Garbage Pail": Nuisance

Nuisance is the most malleable of torts. Indeed, its very versatility has brought it into bad odor with some legal scholars who seem to regard it as, at best, a necessary evil. In the literature on nuisance we can find such philippics as this:

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It has meant all things to all people, and has been applied indiscriminately. . . . There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have af-

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[82] *Id.* at comment i. The comment states: "In order that there may be a trespass under the rule stated in this section, it is not necessary that the foreign matter be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." *Id.*

[83] Dean Prosser, after pointing out that trespass is conceived of as the denial of the plaintiff's possessory right, while nuisance deprives him of the enjoyable use of it, makes the observation that "It is obvious . . . that there are many types of conduct which will interfere with both of these interests . . . . In such cases there is both trespass and nuisance, and the plaintiff is free to pursue his remedy for either." W. Prosser, The Law of Torts § 89, at 595 (4th ed. 1971). No cases were found in which a court held the categories of trespass and nuisance to be mutally exclusive. There is significant authority to the contrary. *See, e.g.*, Borland v. Sanders Lead Co., 369 So. 2d 523, 527 (Ala. 1979)(lead particles; both trespass and nuisance); Irvine v. City of Oelwein, 170 Iowa 653, 150 N.W. 674, 678-79 (1915)(flooding; plaintiff may elect remedy); Mueller v. Fruen, 36 Minn. 273, 30 N.W. 886, 886-87 (1886)(dam; both trespass and nuisance).

> forded so excellent an illustration of the familiar tendency of courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a nuisance, and there is nothing more to be said.[84]

These are the words of Dean Prosser, and no mere law student would be so hardy as to deny them great weight. Nevertheless, at the risk of antagonizing his mighty shade, I make bold to suggest that a tool ought not to be disparaged for having more than one use. The lawyer's desire for precision, clarity and order is one of the glories of the profession, but it ought not to blind him to the fact that many of life's phenomena cannot be neatly pigeonholed. There is great use for a field of liability wherein actions can be tailored to supply the needs of people whose grievances do not fit other torts. Nuisance may be the "garbage pail of torts," but it is well to remember that houses without a garbage pail can become rather unpleasant places.

The first mention of an action in nuisance for the attraction of crowds dates from the reign of William III. In *Rex v. Betterton*,[85] the defendants built a playhouse in Lincoln's Inn fields "which, by reason of the thronging of coaches, and the resort of idle and disorderly persons thither, was a great nuisance to the inhabitants . . . so that they could neither go out with their coaches, or being abroad could not bring their coaches back. . . ."[86] The court issued a writ of prohibition against the theatre.[87]

From *Betterton* until recent years, cases specifically addressing the problems of crowds have, with some exceptions,[88] arisen in a commer-

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[84] W. Prosser & W. Keeton, The Law of Torts § 86 (5th ed. 1984). Although the courts are blamed for this attitude, they have given occasional signs that they share the professorial exasperation. *See, e.g.*, Copart Industries, Inc. v. Consolidated Edison of New York, 41 N.Y.2d 565, 394 N.Y.S.2d 169, 170, 362 N.E.2d 968, 969 (1977)("impenetrable jungle" language quoted with approval).

[85] 90 Eng. Rep. 281 (K.B. 1695).

[86] *Id.* at 281.

[87] *Id.*

[88] In Barker v. Commonwealth, 19 Pa. 412 (1852), the defendant was charged with obstructing the street by causing a crowd to gather. Apparently the onlookers were connoisseurs of billingsgate, for the complaint alleged that the crowd had collected due to the defendant's "violent, loud and indecent language" addressed to persons passing. *Id.* at 412. Apparently the obnoxious character of his conduct was not necessary to his liability, for the court said that nuisance would have lain just as well against him had he set up a printing press in the middle of the street. *Id.* at 413. In Fairbanks v. Kerr, 70 Pa. 81 (1872), an evangelist who began preaching on the street soon drew a crowd; some of the onlookers, emulating Zacchaeus, sought to get a better view by climbing atop some pav-

cial setting,[89] or turned on the *conduct* of the crowd.[90] These cases,

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ing stones lawfully deposited on the sidewalk by the plaintiffs. *Id.* at 88-89. The stones crumbled under the additional weight. The trial court held the preacher liable as a matter of law. *Id.* The Pennsylvania Supreme Court reversed, because the question of whether the preacher should have foreseen such conduct by his hearers was a question of fact for the jury rather than a question of law. A contrary rule, said the court, would mean that "[t]hose who draw crowds together in the streets . . . would be made answerable for many misfortunes if the doctrine of nuisance be so extensive in its consequence." *Id.* at 92. If that was the principal concern, one wonders why the court did not hold the preacher *immune* as a matter of law. In Indiana Motorcycle Ass'n v. Hudson, 399 N.E.2d 775, 778 (Ind. App. 1980), the club was held liable in nuisance when its meetings became the occasion of crowds spilling over onto the plaintiff's land and generally making pests of themselves. It will be observed that *Barker* was a public nuisance case. For purposes of this essay, the distinction between public and private nuisance is of little practical consequence, since an action for private nuisance is always available to those who suffer some private harm, even where the use complained of would also meet the requirements of a public nuisance. W. PROSSER & W. KEETON, *supra* note 84, at § 86.

[89] In the English case of Rex v. Carlile, 6 Car. & P. 636, 172 Eng. Rep. 1397 (Old Bailey 1834), the defendants caused a sensation by placing a set of effigies in their windows. Large crowds gathered to see the display. Justice Park remarked: "The defendant has asked whether he has a right to do what he will on his own premises. No doubt he has, but he must not do anything there that injures his neighbors, so as to be a private nuisance, or anything which annoys the public, so as to be a public nuisance. . . . The question therefore really is, whether. . . the defendant has, by the acts proved, caused an obstruction of the public highway to the nuisance of persons passing that way, and to the persons residing in that neighborhood." *Id.*, 172 Eng. Rep. at 1404. Counsel for the defendant recalled the case of a Mr. Very who owned a confectioner's shop and had a daughter so beautiful that crowds would gather around the store to watch her; he sardonically inquired whether, under this rule, the girl could be banished as a nuisance. The court, apparently in a chivalrous mood, disposed of the case without reaching this issue. 172 Eng. Rep. at 1402.

In Lyons & Sons Co. v. Gulliver, [1914] 1 Ch. 631, the proprietors of a theatre refused to admit people to the premises until minutes before the performance was to begin. The customers piled up on the street outside, blocking access to adjacent shops. Master of the Rolls Cozzens-Hardy said that "a man is or may be liable . . . for attracting, even by something lawfully done on his own premises, a crowd in the street." *Lyons*, 1 Ch. at 642; *accord*, Strand Theatre v. Cahill, 61 Canadian Sup. Ct. 100, 105 (1920).

In Shaw's Jewelry Shop, Inc. v. New York Herald Co., 156 N.Y.S. 651 (N.Y. App. Div. 1915), *aff'd* 224 N.Y. 731, 121 N.E. 890 (1918), the defendant newspaper erected a stereopticon on the outside of its building. *Id.*, 156 N.Y.S. at 653. This machine exhibited pictures of the world series and articles relating to the war in Europe. As a result of this display, the streets around the *Herald* were choked by crowds estimated as high as 40,000 people. *Id.* at 654. Shaw alleged that the display made it difficult for customers to enter his shop. The stereopticon was enjoined as a nuisance. *Id.; see also* Elias v. Sutherland, 18 Abbott 126, 128 (N.Y. Sup. Ct. 1886)(girls drew crowd by combing their "extraordinarily long hair" in shop window); Jaques v. Nat'l Exhibit Co., 15 Abbott 250, 253 (N.Y. Sup. Ct. 1884)(puppet show with "grotesque and ludicrous" characters enjoined due to crowds).

while instructive, are not extensive, and their commercial overtones make them of limited applicability to the problems of people vexed by crowds in a noncommercial setting—though, of course, a strong argument can be made that any practice which is obnoxious in the market place is very likely to be more so in or near the home.[91] Nevertheless, in order to flesh out the proposed action for crowd-related nuisance, it is expedient to examine nuisance liability for sundry separable harms often associated with crowds.

In Shamhart v. Morrison Cafeteria Co., 159 Fla. 629, 32 So. 2d 727 (1947), the line of customers waiting to get into the cafeteria for lunch spilled out into the street and blocked access to adjacent businesses. *Shamhart*, 32 So. 2d at 727. The court granted injunctive relief, chiding the defendant for "utilizing the sidewalk as a waiting room." *Id.* at 728; *accord*, Tushbant v. Greenfield's, Inc., 305 Mich. 626, 14 N.W.2d 520, 521 (1944)(view of storefront blocked by restaurant line).

[90] *See, e.g.*, Palestine Bldg. Ass'n v. Minor, 27 Ky. 781, 86 S.W. 695, 696 (1905)("boisterous" crowds at park); Cronin v. Bloemecke, 58 N.J. Eq. 313, 43 A. 605, 607 (1899)("disorderly persons" used profanity at ball park). An interesting period piece is Fox v. Corbitt, 137 Tenn. 466, 194 S.W. 88, 88 (1817), where the plaintiff complained that a tavern attracted crowds "of a very low order" who were loud and used foul language. *Id.*, 194 S.W. at 88.

In Rex v. Carlile, 6 Car. & P. 636, 172 Eng. Rep. 1397 (Old Bailey 1834), the court attached much less importance to the conduct of the crowd. Thus, when the defendant argued that the crowds, which he had caused to gather, were orderly, Justice Park was unimpressed: "I am not prepared to say that it was necessary to show that they were disorderly persons," though, for all that, "Mr. Alderman Farebrother . . . has told us, that he never saw such a set of fellows in his life, both for behavior and conversation." *Id.*, 172 Eng. Rep. at 1403-04.

[91] The character of the neighborhood is an inescapable measure of potential liability. As one authority says, "the unreasonable character of the annoyance or inconvenience, of course, is always . . . in the light of the general character of the community. F. Harper & F. James, The Law of Torts § 1.23, at 71 (1956). A classic expression of this basic principle was given by Justice Sutherland in the *Euclid* case: "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." Euclid v. Amber Realty Co., 272 U.S. 365, 388 (1927). This principle was applied to residential patterns by a recent commentator who observed that "in determining whether a nuisance exists, it is not sufficient to ask whether an occupier has made a reasonable use of his property; one must ask whether his conduct is reasonable considering the fact that he has a neighbor." Girard, *An Expedition to the Frontiers of Nuisance*, 25 McGill L.J. 565, 575-76 (1980). Court decisions recognizing this principle are legion. *See, e.g.*, Benton v. Pittard, 197 Ga. 843, 31 S.E.2d 6, 7 (1944)(venereal disease clinic in residential neighborhood enjoined); Smith v. Nickoloff, 283 Mich. 188, 277 N.W. 880, 881 (1938)(noise from restaurant in residential area); Russell v. Nostrand Athletic Club, 212 A.D. 543, 209 N.Y.S. 76, 78 (1925)(boxing matches in "high-class residential neighborhood" enjoined); Township of Bedminster v. Vargo Dragway, Inc., 253 A.2d 659, 663 (Pa. 1969)(racetrack in quiet suburb enjoined); Eller v. Koehler, 68 Ohio St. 51, 67 N.E. 89, 91 (1903)(railroad through residential area). *But see* Daniel v. Kosh, 173 Va. 352, 4 S.E.2d 381, 384 (1939)(gas station no nuisance, though in residential area).

A. Noise

Crowds, as a rule, are seldom more than comparatively quiet. Even normal conversation, when simultaneously carried on by a large number of people, can produce an appreciable hubbub. A heightened level of noise is normally to be expected unless the crowd is at prayer—and where some denominations are concerned, even then. This augurs well for the success of crowd-related nuisance actions, since the courts have not offered stiff resistance to nuisance claims based on excessive noise.

Neighbors who produce noise at inopportune times have been recognized since antiquity as one of the banes of civilization.[92] Noise alone, if excessive under the circumstances, can constitute a nuisance;[93] courts, like residents, are more than willing to ascribe deleterious effects to it.[94] They have allowed plaintiffs to recover or granted injunctions for noise produced by, *inter alia*, racetracks,[95] bars,[96] marching band clinics,[97] fans in a grain elevator,[98] various obstreperous acts of college students,[99] dredges in the Potomac River,[100] radios,[101] wood-

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[92] *See, e.g., Proverbs* 27:14 (King James)("He that blesseth his friend with a loud voice, rising early in the morning, it shall be counted as a curse to him").

[93] *See, e.g.*, Wilson v. Interlake Steel Co., 32 Cal. 3d 229, 649 P.2d 922, 925, 185 Cal. Rptr. 280, 283 (1982)(steel mill); Bates v. Quality Ready-Mix Co., 261 Iowa 696, 154 N.W.2d 852, 857 (1967)(cement plant).

[94] *See, e.g.*, Rose v. Chaikin, 167 N.J. Super. 210, 453 A.2d 1378, 1381 (1978). Here the court found that the noise from a windmill in a residential community "disturbed many of the activities associated with the normal enjoyment of one's home, including reading, eating, watching television and general relaxation." *Id.* Stronger rhetoric was employed by the judge who enjoined a dance hall in Gilbough v. West Side Amusement Co., 64 N.J. Eq. 27, 53 A. 289 (1902); he insisted that "the reason why a certain amount of noise is or may be a nuisance is that it is not only disagreeable, but wears on the nervous system [and] . . . tends to shorten life." *Gilbough*, 53 A. at 289.

[95] *See, e.g.*, State v. Waterloo Stock Car Raceway, Inc., 96 Misc. 2d 350, 409 N.Y.S.2d 40, 44 (N.Y. Sup. Ct. 1978)("everyone in the vicinity of the track has had their eardrums hammered away at"). *Accord*, Township of Bedminster v. Vargo Dragway, 434 Pa. 100, 253 A.2d 659, 663 (1969)(racetrack nuisance in fact); Sherrod v. Dutton, 635 S.W.2d 117, 118 (Tenn. Ct. App. 1982)(go-cart track found to be nuisance).

[96] *See, e.g.*, People v. Mason, 124 Cal. App. 3d 348, 353, 177 Cal. Rptr. 284, 287-88 (music and footstomping from a bar).

[97] *See, e.g.*, Friendship Farms Camps, Inc. v. Parson, 172 Ind. App. 73, 359 N.E.2d 280, 283 (1977)(limited injunction granted against band camp).

[98] Daugherty v. Ashton Feed & Grain Co., 208 Neb. 159, 303 N.W.2d 64, 68 (1981).

[99] *See, e.g.*, Farmy v. College Housing, Inc., 121 Cal. Rptr. 658, 665 (Cal. App. 1975)(limited injunction against student apartment building).

[100] Bostick v. Smoot Sand & Gravel Co., 154 F. Supp. 744, 753 (D. Md. 1957).

[101] *See, e.g.*, Gorman v. Sabo, 210 Md. 185, 122 A.2d 475, 477 (1956)(radio played to disturb neighbors).

working machinery,[102] barking dogs,[103] jazz music,[104] and even churches.[105]

An odd exception exists. Although organized sports can produce substantial noise and (because of their frequent connection with schools) are often conducted in residential areas, courts seem to regard them as having a certain amount of social utility and have generally shown reluctance to interfere with them.[106] On the whole, however, noise would seem to have considerable promise as a basis for crowd-related nuisance actions.[107]

B. Sanitation

Where there is a large crowd of people, there will be an equally large crowd of bladders. This can make for a great deal of annoyance for property owners in the vicinity of the crowd, and can also be a menace to public health. The problem is more acute when members of the crowd partake of beverages.[108] Activities which give rise to this sort

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[102] *See, e.g.*, Dallas v. Ladies' Decoration Art Club of Philadelphia, 4 Pa. Co. Ct. R. 340, 344 (1887). Surely these ladies were among the most unlikely nuisance defendants of all time.

[103] *See, e.g.*, Herbert v. Smith, 155 Conn. 78, 230 A.2d 235, 237 (1967).

[104] *See, e.g.*, Phelps v. Winch, 309 Ill. 158, 140 N.E. 847, 848 (1923).

[105] Assembly of God Church of Tahoka v. Bradley, 196 S.W.2d 696, 697 (Tex. Civ. App. 1946). This case involved a congregation of "holy rollers" whose services were prolonged into the wee hours, and whose liturgical wailing could be heard at a distance of one mile.

[106] *See, e.g.*, Cocroft v. Peters, 241 Ga. 115, 244 S.E. 2d 6 (1978)(softball); Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Ashton, 448 P.2d 185, 191 (Idaho 1968)(night baseball); Vickridge First & Second Addition Homeowners Ass'n v. Catholic Diocese of Wichita, 212 Kan. 348, 510 P.2d 1296, 1306 (1973)(general purpose athletic field); Board of Educ. of Louisville v. Klein, 303 Ky. 234, 197 S.W.2d 427, 428 (1946)(night football). *But see* Gilbough v. West Side Amusement Co., 64 N.J. Eq. 27, 53 A. 289, 289 (1902)(Sunday baseball enjoined).

[107] For a general treatment of the problem, see Sharon, *Noise and the Law: A Survey*, 11 DUQUESNE L. REV. 133 (1972).

[108] If there be any who are inclined to take this kind of harm lightly, let them consider the custom of the "Death March." I became acquainted with this execrable institution while attending graduate school at the University of Notre Dame. Approximately one mile south of the campus, in the city of South Bend, there is an intersection at which several taverns are located. On the Friday before the last home football game of each season the senior class, as a body, would visit each of these taverns *seriatim* and keep going until they either got back to their dormitories or collapsed from exhaustion or drunkenness (hence the name). The neighborhood between Notre Dame and this intersection is entirely residential, and the diuretic activities of the students en route became notorious. By 1981, the university administration had grown sufficiently embarrassed to ask the seniors not to hold the Death March, and a relatively conventional party was

of abuse can almost certainly be enjoined, unless they have greater social utility than one would expect from an affair which would attract this type of crowd.[109]

C. *Traffic Congestion And Loss Of Access*

A crowd in the street will naturally impede the movement of vehicles, and in extreme cases bring all traffic to a standstill. When members of the crowd themselves arrive in automobiles, the problem will be compounded. Even so, the courts by and large have resisted the idea that an increase in traffic, in and of itself, will support a nuisance action.[110] Most exceptions[111] have been connected with crowds so great that they threatened to overwhelm the community. In this situation, as in others, rock festivals seem to arouse judges' sympathy for the targeted communities.[112]

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instituted in its stead. Remarkably, during its existence the Death March provoked neither litigation nor homicidal retaliation by the townspeople. If this essay were the sort of work for which a dedication is appropriate, the unfortunate inhabitants of this neighorhood would surely be worthy of it.

[109] Rock festivals often create public fear of sanitation problems, and courts have occasionally responded to the anxiety of communities fearing another Woodstock. *See* Town of Preble v. Song Mountain, Inc., 62 Misc. 2d 353, 308 N.Y.S.2d 1001, 1004 (N.Y. Sup. Ct. 1970)(30,000 expected for rock festival in rural area; enjoined); *see also* Drew v. Town-Mac, Inc., 61 Misc. 2d 55, 304 N.Y.S.2d 1003, 1008 (N.Y. Sup. Ct. 1969)(involved zoning as well as nuisance; enjoined). In Amdor v. Cooney, 43 N.W.2d 136 (Iowa 1950), baseball games were enjoined after spectators urinated on the plaintiff's land.

[110] *See, e.g.*, Fugazotto v. Brookwood One, 295 Ala. 169, 325 So. 2d 161, 162 (1976)(new road increased traffic; no relief); Clark v. Town of Estes Park, 654 P.2d 855, 857 (Colo. Ct. App. 1982)(parking lot; no relief); Guzzardi v. Perry's Boats, Inc., 92 A.D.2d 250, 460 N.Y.S.2d 78, 82 (1983)(marina; increase in traffic held "insubstantial"); DeBorde v. St. Michael & All Angels Episcopal Church, 272 S.C. 490, 252 S.E.2d 876, 883 (1979)(cemetery caused traffic increase due to mourners; no relief). *But see* Long Island Court Homeowners Ass'n v. Methner, 74 Mich. App. 383, 254 N.W.2d 57, 59 (1977)(marina increased traffic; action upheld).

[111] *See, e.g.*, Phelps v. Winch, 309 Ill. 158, 140 N.E. 847, 848 (1923)(dance hall enjoined on dual grounds of noise and traffic).

[112] *See, e.g.*, Planning and Zoning Comm'n of Town of Middlefield v. Zemel Bros., Inc., 29 Conn. Sup. 45, 270 A.2d 562, 568 (1970)(50,000 rock fans in town would be "unmanageable"; festival enjoined). *Accord*, County of Sullivan v. Filippo, 64 Misc. 2d 533, 315 N.Y.S.2d 519, 529 (N.Y. Sup. Ct. 1970)(rock concert with inadequate accomodations found unmanageable and enjoined). The general lack of judicial sympathy for rock festivals made one young commentator fume: "Each year many cities spend thousands of dollars attracting conventions and tourists; but change the character of the convention to a gathering of young people with long hair and the court seems to have a hard time pushing its prejudices aside." Comment, *Rock Festivals and Nuisance*, 25 ARK. L. REV. 362, 367 (1971). But in Berkeley County Comm'n v. Shiley, 295 S.E.2d 924 (W.Va. 1982),

In cases where the activity complained of has effectively deprived the plaintiff of access to his property, courts have tended to be less tolerant. The relatively isolated exception here is *Rodrigue*, where the judge held that the evidence did not support the allegation that the petitioners were captives in their homes, and expressed his belief that emergency vehicles could enter and leave the neighborhood without undue delay.[113] Several other courts have been more sympathetic to plaintiffs similarly situated.[114]

On balance, traffic considerations seem unlikely to furnish a strong basis for crowd-related nuisance actions. They need not be discounted altogether, however; the intensity of the problem has a definite bearing on the receptivity of courts in this area, and when a large crowd is involved, all of the dangers discussed above are present in a much higher degree.

D. Other Factors

Of course, the party complaining of damage inflicted or threatened by a crowd must satisfy the elements of any other nuisance complaint. For the most part,[115] these requirements are neither confusing nor onerous. It is basic that nuisance will not lie unless the conduct of the defendant is shown to be the legal cause of the interference with the

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the court complimented the promoter on his efforts to alleviate any problems associated with concerts and lifted the injunction banning such attractions. *Shiley*, 295 S.E.2d at 926.

[113] *Rodrigue*, slip op. at 2 (24th Jud. Dist.).

[114] *See, e.g.*, Strong v. Sullivan, 180 Cal. 331, 181 P. 59, 60 (1919)(portable lunch wagon and customers blocked plaintiff's shop); Frick v. Kansas City, 117 Mo. App. 488, 93 S.W. 351, 353 (1906)(earth movers blocked access to plaintiff's shop; damages awarded); Harman v. Louisville, New Orleans & Tex. R.R., 87 Tenn. 614, 11 S.W. 703, 705 (1889)(earth movers; damages awarded); Brough v. Ute Stampede Ass'n, 105 Utah 446, 142 P.2d 670, 672 (rodeo parade blocked plaintiff's property).

[115] Authorities are divided over whether an isolated event can constitute a nuisance. Harper & James say categorically that "recurrence or continuance of the invasion is characteristic of nuisance . . . ." F. HARPER & F. JAMES, *supra* note 91, at § 1.23. Some courts have so held, *e.g.*, Bowen v. City of Kansas City, 231 Kan. 450, 646 P.2d 484, 487 (1982). Dean Prosser takes the position that the recurrence or continuance of the thing complained of is only one factor out of many to be considered. W. PROSSER & W. KEETON, *supra* note 84, at § 87; *see also* E. Rauh & Sons Fertilizer Co. v. Shreffler, 139 F.2d 38, 41 (6th Cir. 1943)(applying Ohio law; single failure of defendant's fan caused gas to damage plaintiff's flowers); Commonweath v. McGovern, 116 Ky. 212, 75 S.W. 261, 267 (1903)(single prize fight a nuisance). The Prosser position seems the better view, as the contrary rule would relegate victims of an isolated instance of crowd damage to the action for trespass, the inadequacy of which in this context has already been discussed. *See supra* notes 57-83 and accompanying text.

plaintiff's rights.[116] In this context, the requirement means that he must be shown to be directly responsible for gathering the crowd. Although nuisance is spoken of as focusing on the nature of the harm rather than the character of the defendant's behavior,[117] there is general agreement that the interference with the plaintiff's enjoyment of his land must be "unreasonable."[118] This usually means that the harm suffered by the plaintiff must be "substantial," or other words to that effect.[119] The reasonableness of the defendant's conduct is commonly determined by balancing the harm suffered by the plaintiff against the social utility of the defendant's activity.[120] As a rule, the utility of activities which attract rubberneckers in areas where crowds are not nor-

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[116] RESTATEMENT (SECOND) OF TORTS § 822 (1977). A recent application of this principle is instructive. A couple in Missouri owned a vacant lot on which teenage idlers congregated, shooting off fireworks and otherwise annoying the neighbors with boisterous conduct. The court held that since the owners neither knew nor could have known of this situation, no conduct of theirs could be described as the proximate cause of the interference, and that a landowner could not be liable in nuisance when the nuisance was created independently by others, though on his property. Bellflower v. Pennise, 548 F.2d 776, 778 (8th Cir. 1977).

[117] "Nuisance is a condition, not an act." Vincent v. Salt Lake County, 583 P.2d 105, 107 (Utah 1978).

[118] W. PROSSER & W. KEETON, *supra* note 84, at § 87; *see also* State v. Waterloo Stock Car Raceway, Inc., 96 Misc. 2d 350, 409 N.Y.S.2d 40 (N.Y. Sup. Ct. 1978), in which the judge remarked, "This is not a case where the populace is grumbling about mere trifles and slight inconveniences. If it were, this court would turn a deaf ear . . . . Instead, this is a completely unreasonable use of the defendant's premises to the material injury of his neighbors' premises . . . ." 409 N.Y.S.2d at 44. A defendant will also be liable under the rules of strict liability if the use complained of constitutes an abnormally dangerous activity. RESTATEMENT (SECOND) OF TORTS § 822(b)(1977).

[119] W. PROSSER & W. KEETON, *supra* note 84, at § 87.

[120] An early attempt at such a balancing test is found in William Aldred's Case, 9 Co. Rep. 576, 77 Eng. Rep. 816 (K.B. 1610). Aldred sued Thomas Benton for constructing a pigsty on Benton's property. Benton answered that "the building of the house for hogs was necessary for the sustenance of man, and one ought not to have so delicate a nose that he cannot bear the smell of hogs . . . ." 77 Eng. Rep. at 817. It does not appear that Lord Coke had any quarrel with this as a general principle; nevertheless, he found for Aldred because Benton, out of pure meanness, had placed the sty as near Aldred's house as possible ("*Tam prope aulam et conclave ipsius Willielmi*"). *Id.* at 822. Since the time of King James, the pig's stock has fallen in the eyes of the law; it was recently held that "by the very nature of its operation, a piggery is offensive" to those in the area. *See, e.g.*, Jewitt v. Deerhorn Enters., 575 P.2d 164, 167 (Or. 1978)(pigsty held to be nuisance).

For a balancing test more typical of modern courts, see Great Atlantic & Pacific Tea Co. v. LaSalle Nat'l Bank, 77 Ill. App. 3d 418, 395 N.E.2d 1193 (1979), which says that a court must weigh (1) the extent of the harm suffered by the plaintiff; (2) the character of the harm; (3) the "social value" of the offending activity; (4) the character of the locality; and (5) the plaintiff's burden of avoidance. 395 N.E.2d at 1198.

mally expected is not likely to be great. Given the proper facts, it should not be particularly difficult for an aggrieved person, with the help of counsel, to frame a suitable nuisance complaint.

VI. Closing Considerations

For the reasons discussed above, the common law of nuisance seems by far the most appropriate vehicle for the relief of those damaged or threatened by crowds. Strictly speaking, the assistance of the needy is so worthy a goal that no other need be sought. Yet I believe that nuisance actions of this type may have the additional salutary effect of redressing a certain imbalance which has crept into the law of torts. Traditionally, tort has tended to emphasize society's interest in promoting the thickness of its citizens' hides—encouraging them to suffer, while evils are sufferable, rather than to resort to the courts upon any provocation. That is all well and good; if we encouraged people to litigate over every slight or trifling injury they imagine they have received, our courts would not have time to handle much other business. But it is hard to shake the nagging suspicion that in adjusting to the coarsening of American manners, the law has thereby contributed to that process.

In some ways, the balance has begun to be redressed. In this century the law, through actions relating to the interest of privacy, has begun to recognize one's own property as a zone of limited privilege where the owner need not submit to indignities he would have to bear patiently if they were offered in the marketplace.[121] In recent years, the private person has needed all the help he can get, as the potential for intrusions upon him has increased geometrically.[122] No one proposes, or should propose, that we become a nation of hermits; but every American citizen should, within definite limits, be free to remove the layer of emotional elephant-hide which he keeps for public use, and to settle back in an easy chair, put a Bach cantata on the turntable, and let the world be God's again. I believe that legal actions of the type envisioned by this essay can help to confine the disadvantages of crowds to a more appropriate sphere, and thus, in a small way, would help to vindicate this important interest.[123] One is tempted to say that

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[121] For a good discussion of privacy actions, see generally W. Prosser, Law of Torts § 117, *supra* note 83.

[122] As early as the 1920's, a leading man of letters was quoted as saying that the American home was "no longer a harbor and a haven, but rather a mere place of debarkation." George J. Nathan, *Reader's Digest* (Oct. 1927).

[123] The interest in privacy discussed here, of course, is not to be confused with the

if lawyers lend a hand in this enterprise, a grateful populace may beat a path to their doors.*

Cecil Ross

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seemingly omnivorous substantive due process "right to privacy" fashioned by the Supreme Court in recent decisions concerning constitutional law. For examples of the latter, see Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973).

* Editor's Note: As this issue went to press, the Supreme Court of Louisiana had just enjoined Alvin Copeland from operating his Christmas display "in a manner which attracts bumper to bumper traffic and extremely large numbers of visitors to his limited access, residential neighborhood." Rodrigue v. Copeland, No. 85-C-0484, slip op. at 20 (La. Sept. 10, 1985). The court concluded that Copeland's display had caused real damage to the plaintiffs and that the plaintiffs would be irreparably harmed in the absence of injunctive relief. *Id.* at 15; *see Dim Your Lights, La. High Court Orders Copeland*, Times-Picayune (New Orleans), Sept. 11, 1985, at A-21, col. 1.

RECENT DECISIONS

Criminal Procedure—Exclusionary Rule—Information Obtained Through Violation of Sixth Amendment Will Not Preclude Admission Once Prosecution Exhibits by Preponderance of Evidence That Information Would Have Inevitably Been Discovered

After the reported disappearance of ten-year old Pamela Powers from a YMCA in Des Moines, Iowa, police received information which linked respondent to the child's disappearance and which resulted in respondent's arrest and arraignment in Davenport, Iowa, approximately 160 miles east of Des Moines.[1] Two police officers, who were to pick up respondent in Davenport and take him to Des Moines, agreed with respondent's counsel that they would not interrogate respondent during the drive.[2] In the course of the trip, a wide-ranging conversation ensued which included a discussion of religion and a "Christian burial speech"[3] by one officer which prompted respondent to make incrimi-

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[1] Nix v. Williams, 104 S. Ct. 2501, 2504-05 (1984). Soon after the child's disappearance, respondent Williams was seen leaving the YMCA with a "large bundle wrapped in a blanket." *Id.* at 2504. Williams' car was subsequently discovered in Davenport. A blanket, similar to the one Williams was seen carrying when he left the YMCA, and several articles of respondent's and victim's clothing were discovered at a rest stop between Des Moines and Davenport. A warrant was issued for the arrest of Williams. *Id.* at 2504. Two days after the disappearance of Pamela, Williams surrenderd to the local authorities in Davenport and was arraigned. *Id.* at 2505.

[2] *Id.*

[3] *Id.* One of the officers initiated a conversation with respondent, stating the following:

> I want to give you something to think about while we are traveling down the road. . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area [where the body is] on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered . . . .

nating statements[4] that ultimately led the officers to the child's body.[5] Before respondent made the incriminating statements a systematic search involving approximately 200 volunteers had been initiated,[6] and at the time respondent agreed to cooperate with the officers, volunteers were within two and one-half miles of the young victim's body.[7]

Charged with first-degree murder before an Iowa court, the respondent's motions to suppress all evidence relating to his statements and the body discovered as a result thereof were denied,[8] and the jury found respondent guilty of murder.[9] Following the affirmation of the conviction by the Iowa Supreme Court,[10] the United States Supreme Court, upon review of federal habeas corpus proceedings,[11] held that the officers had obtained the incriminating statements in violation of respondent's sixth amendment right to counsel.[12] The Court suggested that while evidence of the location and condition of the child's body might be admissible on the theory that the body would have been inevitably discovered even in the absence of the unlawful police conduct,[13]

[A]fter a snow storm [we may not be able] to find it at all.

Id.

[4] *Id.* Williams told the officers where he believed they could find the young girl's shoes and the blanket which he had used to conceal the child's body. When the officers did not find the blanket or the shoes, Williams, without further interrogation, agreed to show the officers where the body was located. *Id.*

[5] *Id.* The child's body was found next to a culvert in a ditch beside a dirt road, essentially within the area to be searched. *See infra* notes 6-7 and accompanying text.

[6] *Nix*, 104 S. Ct. at 2504. The Iowa Bureau of Investigation organized the volunteers into teams which searched the areas several miles north and south of Interstate 80, the interstate connecting Des Moines and Davenport. The volunteers were instructed to check all roads, ditches, abandoned buildings, culverts, and any place where a small child's body might be disposed. *Id.* at 2505.

[7] *Id.* Officers in charge of the efforts called off the search at 3 p.m. after learning that the officers accompanying Williams were in route to the site of the young girl's body. *Id.*

[8] *Id.* The ground for the suppression motions was that this evidence was "fruit" of Williams' incriminating statements, which were procured through the officer's "Christian burial speech." *Id.*

[9] *Id.*

[10] State v. Williams, 182 N.W.2d 396, 406 (1970).

[11] *Nix*, 104 S. Ct. at 2505-06. Williams sought habeas corpus relief in the United States District Court for the Southern District of Iowa. The district court determined that the disputed evidence had been wrongfully admitted at Williams' murder trial. Williams v. Brewer, 375 F. Supp. 170, 185 (S.D. Iowa 1974). A divided panel of the United States Court of Appeals for the Eighth Circuit agreed with the holding of the district court, Williams v. Brewer, 509 F. 2d 227, 234 (8th Cir. 1974), and the United States Supreme Court granted certiorari, Brewer v. Williams, 423 U.S. 1031 (1975).

[12] Brewer v. Williams, 430 U.S. 387, 397-98 (1977).

[13] *Id.* at 406 n.12.

evidence of respondent's incriminating statements was not admissible.[14] On retrial, after the court had determined that the state had met its burden of proving that the body would have inevitably been discovered in the same condition in which it was actually discovered,[15] the court admitted evidence concerning the location and condition of the body[16] and respondent was once again convicted of first-degree murder.[17] The Iowa Supreme Court affirmed,[18] but the United States Court of Appeals for the Eighth Circuit granted respondent's writ of habeas corpus.[19] The circuit court held that even admitting the validity of an inevitable discovery exception to the exclusionary rule, the prosecution had not met the requisite burden of proving the absence of bad faith.[20] On appeal, the United States Supreme Court, *held,* reversed and remanded. Once the prosecution exhibits by a preponderance of the evidence that information sought to be introduced would have inevitably been discovered, the fact that the information was obtained through violation of the sixth amendment, whether or not that violation was made in bad faith, will not preclude the admission of the evidence. *Nix v. Williams,* 104 S. Ct. 2501 (1983).

Common-law evidentiary rules did not address the manner by

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[14] *Id.* The Court reasoned that in the event of a retrial, the state court should determine whether particular items of disputed evidence should be admitted. *Id. See generally* Note, *Constitutional Law—Criminal Procedure—Where Suspect has not Waived His Right to an Attorney's Assistance, Confession Prompted by Detective's Statements when Counsel was Absent is Inadmissible,* 11 CREIGHTON L. REV. 997, 997-1002, 1026-30 (1978)(discussion of Brewer v. Williams, 430 U.S. 387 (1977)).

[15] Nix, 104 S. Ct. at 2506 (1984). The trial court concluded that the child's body would have been discovered "within a short time." *Id.*

[16] *Id.* The trial court admitted articles of the child's clothing, photographs of the clothing, and the results of post mortem chemical and medical tests of the victim's body. *Id.*

[17] *Id.* Williams was sentenced to life in prison. *Id.*

[18] State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979). The court, adopting a two-part test, held that the state had proven by a preponderance of the evidence that the police did not act in bad faith to hasten the discovery of the challenged evidence and that the body would have been discovered by lawful means. *Id.* at 260-62.

[19] Williams v. Nix, 700 F.2d 1164, 1173 (8th Cir.), *cert. granted,* 103 S. Ct. 2427 (1983). The district court had earlier denied the habeas relief. Williams v. Nix, 528 F. Supp. 644, 675 (S.D. Iowa 1981).

[20] Williams v. Nix, 700 F.2d 1164, 1173 (8th Cir. 1983). The court reasoned that since the state had not met the first requirement, the absence of bad faith, it was unnecessary to determine the question of inevitable lawful discovery of the evidence. *Id.* The court also held that it was not necessary to determine whether the two-part test must be proven by a "preponderance of the evidence" or by a "clear and convincing" standard. *Id.* at 1169.

which evidence was discovered.[21] The adoption by the United States Supreme Court of the exclusionary rule in 1914, however, provided a new and more limited parameter to the admissibility of evidence.[22] The newly adopted exclusionary rule provided for exclusion of evidence procured by federal officers through violation of a defendant's constitutional rights.[23] Though originally held applicable to abridgements of fourth-amendment rights,[24] the rule has been applied to the fifth[25] and sixth amendments[26] as well. The primary purpose of the exclusionary rule is the deterrence of unlawful police conduct by removing the incentive for officials to procure evidence through violation of a defendant's constitutional rights.[27] Although not providing an independent

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[21] *See* Comment, *Fruit of the Poisonous Tree: Recent Development as Viewed Through its Exceptions*, 31 U. MIAMI L. REV. 615, 615 (1977)(illegal methods unrecognized by common law became "fruit of poisonous tree").

[22] *See* Weeks v. United States, 232 U.S. 383, 398 (1914)(prejudicial error committed when letters admitted at trial in violation of constitutional rights). In *Weeks*, the Court suggested that those who enforce the laws of this country by means of illegal searches and forced confessions should not find sanction from courts which are charged to uphold the Constitution. *Id.* at 392.

[23] *See id.* at 398 (exclusionary rule limited to federal government and its agencies). The Court reasoned that if tangible evidence can be unlawfully seized and admitted at trial against an accused, then the fourth-amendment mandate that a citizen is to be secure from such searches and seizures "is of no value." *Id.* at 393.

Although the Court in *Weeks* expressly limited the application of the rule to federal courts, application of the exclusionary rule was extended to the states in 1961. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961)(evidence obtained by searches and seizures violative of United States Constitution inadmissible in state court).

[24] *See* Weeks v. United States, 232 U.S. 383, 398 (1914)(evidence seized without warrant is inadmissible).

[25] *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966)(confessions made in violation of right against self-incrimination inadmissible).

[26] *See* United States v. Wade, 388 U.S. 218, 240-41 (1967)(identification made in post-indictment lineup conducted in violation of right to counsel held inadmissible); *see also* Escobedo v. Illinois, 378 U.S. 478, 491 (1964)(statements obtained during interrogation in violation of right to counsel inadmissible).

[27] Elkins v. United States, 364 U.S. 206, 217 (1960). The *Elkins* Court noted that invasions of personal liberties often find no practical redress. *Id.* The deterrent purpose of the exclusionary rule assumes that police have engaged in willful or negligent conduct which deprives defendants of a constitutional right. By refusing to admit evidence gained through such conduct, the Court hoped to instill in the investigating officers a desire to act with greater care towards rights of the citizenry. Michigan v. Tucker, 417 U.S. 433, 447 (1974); *see also* United States v. Calandra, 414 U.S. 338, 347 (1974)(primary objective of exclusionary rule is deterrence of future unlawful police conduct). In *Calandra*, the Court suggested that despite the broad deterrence rationale, use of the exclusionary rule has been restricted to situations where its remedial objectives are most effectively served. *Id.* at 348; *cf.* Desist v. United States, 394 U.S. 244, 254 n.24 (1969)(refused to extend exclusionary rule to cases where deterrence is not served). The logic of the deter-

basis for exclusion of evidence, both preservation of judicial integrity[28] and protection of the court from reliance on untrustworthy evidence[29] have been posed as secondary reasons for the exclusionary rule.

The exclusionary rule originally applied only to evidence obtained as a direct result of police misconduct.[30] The United States Supreme Court, however, broadened the reach of the exclusionary rule in *Silverthorne Lumber Co. v. United States*,[31] holding that in addition to precluding introduction of the unlawfully procured evidence itself, courts must also exclude any evidence secured indirectly as a result of the original violation of law.[32] The *Silverthorne* Court set aside the conviction of a defendant for failure to obey a subpoena commanding the production of certain records.[33] The Court held that since the subpoena was issued on the basis of evidence acquired as the proximate

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rence rationale has not gone unquestioned. *See* Irvine v. California, 347 U.S. 128, 135 (1954)(disciplinary effect of court's releasing defendant for police misbehavior is no more than mild deterrent); *see also* Caks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. OF CHI. L. REV. 665, 672 (1970)(no convincing evidence to verify premise of deterrence upon which exclusionary rule is based).

[28] *See* Brown v. Illinois, 422 U.S. 590, 599 (1975)(recognized consideration of judicial integrity as "commonplace"); Elkins v. United States, 364 U.S. 206, 222 (1960)(consideration of judicial integrity rejects doctrine which would admit evidence seized in violation of constitutional rights); Olmstead v. United States, 277 U.S. 438, 470 (1928)(Holmes, J., dissenting)(judicial code does not permit judge to allow police iniquities to succeed). *But see* Michigan v. Tucker, 417 U.S. 433, 450 n.25 (1974)(judicial integrity is not independent basis for excluding disputed evidence).

[29] *See* Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974)(describing secondary purpose as "protection from reliance on untrustworthy evidence," since coerced statements are subject to mistrust); *cf.* Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964)(law enforcement system relying merely on "confessions" rather than evidence secured through skillful investigations will be less reliable). *But cf.* United States v. Ceccolini, 435 U.S. 268, 278 (1978)(determination that discovery of evidence was subject to exclusion was not based on "comparative reliability" of evidence).

[30] *See* Weeks v. United States, 232 U.S. 383, 398 (1914)(private papers seized in violation of fourth-amendment rights held inadmissible). *See generally* Comment, *supra* note 21, at 615-17 (discussing scope of exclusionary rule and noting that question of whether indirect evidence fell within rule was not answered until 1920 in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)).

[31] 251 U.S. 385 (1920).

[32] *Id.* at 391-92.

[33] *Id.* at 392. Federal agents arrested Federick Silverthorne and his father, detaining them for several hours. During this time, agents unlawfully seized the Silverthornes' company records and delivered them to the district attorney. *Id.* at 390. Prior to the issuance of a court order compelling the return of the original records, government officials copied the records and used the copies as the basis for issuance of a subpoena for the originals. The Silverthornes' refused to produce the original records in accordance with the subpoena and a district court held them in contempt of court. *Id.* at 391.

result of an illegal search, the subpoena could not be used to compel the production of other evidence.[34] The *Silverthorne* Court enlarged the scope of the exclusionary rule to include what is called "fruit of the poisonous tree."[35] This "fruit," as Justice Frankfurter called it,[36] refers to challenged evidence which is "secondary" or "derivative." This evidence, while not itself obtained as the consequence of an illegality, is said to be "fruit" which is "tainted" because of a prior constitutional violation which led to its discovery.[37] Although embracing "fruit of the poisonous tree" into the exclusionary rule, the *Silverthorne* Court made it clear that evidence obtained through illegal means would not automatically be rendered "sacred and inaccessible."[38] This suggestion, that it was possible to admit evidence acquired through unauthorized means, later gave rise to the recognition of exceptions to the exclusionary rule, applicable in situations where the "taint" of the original illegality had been mitigated.[39]

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[34] *Id.* at 392.

[35] The "fruit of the poisonous tree" doctrine, first espoused in *Silverthorne*, received its most comprehensive study and articulation in Nardone v. United States, 308 U.S. 338, 341 (1939), and in Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). *See generally* Comment, *supra* note 21, at 616-17 (tracing background of "fruit of the poisonous tree" doctrine).

In Nardone v. United States, 308 U.S. 338 (1939), the United States Supreme Court found that in consideration of ethical standards and preservation of personal liberties, restraints should be put on the indirect as well as the direct use of unlawfully seized evidence. *Id.* at 340. The Court suggested that the accused should have an opportunity to prove that parts of the case against him were "fruits of the poisonous tree." *Id.* at 341.

In Wong Sun v. United States, 371 U.S. 471 (1963), the Court adopted a test for ascertaining whether the disputed evidence sought to be introduced is "fruit of the poisonous tree." The test is whether, given the original illegality, "the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoting J. MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

[36] *See* Nardone v. United States, 308 U.S. 338, 341 (1939)(accused should have chance to prove that substantial portion of case against him was "fruit of the poisonous tree").

[37] *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 9.3, at 427 (1985)(discussing generally "fruit of the poisonous tree").

[38] *Silverthorne*, 251 U.S. at 392. The Court noted that although facts derived from violations of constitutional rights may be suppressed, if knowledge of those facts was procured through an independent source, then the disputed facts may nevertheless be proved. *Id.*

[39] *See generally* Comment, *supra* note 21, at 617-29 (atudy of exceptions to "fruit of poisonous tree" doctrine). The exceptions to the exclusionary rule most commonly advanced are the attenuation doctrine, the independent sources doctrine, and the hypothetical independent sources or inevitable discovery rule. United States v. Crews, 445 U.S. 463, 470 (1980).

The inevitable discovery exception to the exclusionary rule[40] was directly applied first in *Somer v. United States*.[41] In *Somer* two investigators for the Alcohol and Tax Unit made an unlawful entrance into Somer's apartment and learned from Somer's wife that he was out delivering the "stuff" and was expected to return soon.[42] Upon Somer's return, the officers seized evidence of contraband discovered in Somer's automobile[43] and placed him under arrest. The United States Court of Appeals for the Second Circuit held that based on the lower court's record it was the information illegally procured from Somer's wife which determined the officers' course of action; therefore, the contraband should be excluded.[44] The court reasoned, however, that on remand the prosecution should be given the opportunity to prove that

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The independent sources exception can be traced back to *Silverthorne*, where the Court determined that if knowledge of disputed facts is procured through an "independent source," then the facts may be admissible. *Silverthorne*, 251 U.S. at 392. The Court in Wong Sun v. United States, 371 U.S. 471, 487 (1963), reiterated and gave a more comprehensive discussion of the independent sources exception. The Court stated that the "fruit of the poisonous tree" doctrine has no application when authorities discover evidence from an "independent source." *Id. See generally* Comment, *supra* note 21, at 622-25 (analyzing independent sources exception).

The attenuation doctrine was espoused in Nardone v. United States, 308 U.S. 338, 341 (1939), where the Supreme Court held that where the nexus between police misconduct and discovery of disputed evidence has "become so attenuated as to dissipate the taint," the exclusionary rule should have no application. *Id.* In Wong Sun v. United States, 371 U.S. 471 (1963), the Court repeated the attenuation language found in *Nardone* and applied the exception to a confession obtained when the accused had returned voluntarily several days after his initial illegal arrest. Wong Sun v. United States, 371 U.S. 471, 488 (1963). *See generally* Comment, *supra* note 21, at 617-22 (discussion of development and application of attenuation exception).

[40] This exception is often perceived as an expansion of the independent sources exception. *See* Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88, 89 (1974)(inevitable discovery exception "fleshed out" of independent sources doctrine); *see also* Lacount & Girese, *The "Inevitable Discovery" Rule, an Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483, 485-86 (1976)(inevitable discovery is conceptual extension of independent sources rule). These writers suggested that the inevitable discovery exception is a conceptual extension of the independent sources doctrine because the former provides an opportunity for prosecutors to "purge the taint" of unlawfully obtained evidence by showing that an independent line of investigation would have inevitably led authorities to the disputed evidence. *Id.*

[41] 138 F.2d 790 (2d Cir. 1943).

[42] *Id.* at 791. Before Somer's return, the officers searched the apartment and discovered an operating still. *Id.*

[43] *Id.* The investigators found containers of alcohol and a package marked "granulated sugar." *Id.*

[44] *Id.* at 791-92.

even in the absence of his wife's statements, the officers would have waited for Somer's return and would have arrested him in the same manner.[45] The court concluded that if this burden of proving the inevitability of the discovery could be met, then the seizure might have been lawful.[46] Although the Second Circuit had apparently adopted the inevitable discovery exception in *Somer*, the court rejected the doctrine by implication in 1962.[47] This implicit rejection of the inevitable discovery exception did not, however, foreshadow a nationwide trend towards rejection of the exception. Rather, in the succeeding year, the first of many circuits adopted an expansive inevitable discovery exception.[48] In *Wayne v. United States*,[49] the United States Court of Appeals for the District of Columbia upheld the admission of evidence procured through inspection of the victim's body which the defense argued had been discovered as a direct consequence of an unlawful entry.[50] Without reaching the lawfulness of the initial entry, the court agreed with the prosecution's contention that because the coroner would have eventually been advised by police of the information about the victim's whereabouts, as disclosed by the victim's sister, the coroner's findings could not be considered "fruit of the poisonous tree."[51] The court held that it was inevitable, even had there been no initial unlawful entry, that examination of the body and evidence derived therefrom would have been obtained by the authorities.[52] Important to the court's decision was a determination that there was no "causal rela-

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[45] *Id.* at 792.

[46] *Id.*

[47] *See* United States v. Paroutain, 299 F.2d 486, 491 (2d Cir. 1962)(conviction reversed because disputed evidence was obtained through police misconduct rather than independent source). The court reasoned that the "poison" could not be cured by mere possibilities of independent information, but rather that the "test must be one of actualities, not possibilities." *Id.* at 489. The Second Circuit did not embrace the exception again until 1973 in United States v. Falley, 489 F.2d 33 (2d Cir. 1973). *See infra* notes 65-68 and accompanying text.

[48] *See* LaCount & Girese, *supra* note 40, at 487 (noting adoption of "full blown" inevitable discovery rules, applicable where the actual source of evidence was illegally obtained but would have been lawfully obtained through independent sources).

[49] 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

[50] *Wayne*, 318 F.2d at 209. After first knocking and calling out "police" and then seeking to obtain entrance with use of the caretaker's master keys, the police forced the door and entered. *Id.*

[51] *Id.* The court reasoned that the police already knew that the decedent was within the premises because her sister had told them so. *Id.*

[52] *Id.* It has been suggested that this opinion marked a departure from the normal parameters of the inevitable discovery exception in that it represented speculation which did not amount to the necessary level of inevitability. *See* Note, *supra* note 40, at 97.

tionship" between the unlawful entry and the evidence which the defendant sought to have suppressed.[53] The Seventh Circuit also found causation an important consideration in its adoption of the inevitable discovery exception. In *United States ex rel. Owens v. Towney*,[54] the respondent argued that testimony of a witness was tainted because police had discovered the location of the witness only after an unlawful search had revealed her work address.[55] The court reasoned that the "effective cause" of the discovery of the witness's identity was not the illegal search, but rather leads possessed by the police prior to the search, which would have inevitably led to disclosure of her whereabouts.[56]

Often, in adopting the rationale of inevitable discovery, courts scrutinized the nature of the investigatory procedures being employed to reveal the inevitability of procuring the evidence.[57] In *Government of Virgin Islands v. Gereau*,[58] for example, police secured a statement from a murder suspect in which he admitted having thrown a murder weapon out a window of the building in which he was arrested and onto the roof of an adjoining building.[59] Though the statement was secured in violation of the defendant's fifth-amendment rights, the United States Court of Appeals for the Third Circuit held that the weapon was admissible based on a finding that a "saturation search"[60]

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[53] *Wayne*, 318 F.2d at 209.

[54] 508 F.2d 858 (7th Cir. 1974).

[55] *Id.* at 865. Police searched the apartment where the witness lived with the respondent. One of the items unlawfully seized was a booklet containing the work address of the witness. *Id.* at 864-65.

[56] *Id.* at 866. Prior to the search, the police knew the witness's name and place of residence, that she lived with the respondent, and that she had a job. *Id.*

The court also held that the disputed evidence was admissible under the independent sources exception. *Id.; see* United States v. Alvarez-Porras, 643 F.2d 54, 64 (2d Cir.)(consideration of inevitability doctrine in *Owens* was unnecessary since same result would have been obtained through another exception), *cert. denied sub. nom.* Garcia-Perez v. United States, 454 U.S. 839 (1981).

The court cited Wong Sun v. United States, 371 U.S. 471 (1963), as having established the inevitability doctrine as an exception to the exclusionary rule. *Owens*, 508 F.2d at 865. *But cf.* Comment, *supra* note 21, at 626 (stating that reliance on *Wong Sun* was misplaced).

[57] *See* LaCount & Girese, *supra* note 40, at 492-98 (analyzing investigative procedures, performance of which would result in inevitable discovery).

[58] 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 402 U.S. 909 (1975).

[59] *Gereau*, 502 F.2d at 927. An unlawful interrogation resulted in discovery of the location of the gun. At trial, the court admitted evidence of the weapon, but suppressed the defendant's statement obtained after his request for an attorney. *Id.*

[60] *See* United States v. Cole, 463 F.2d 163, 173 n.17 (2d Cir. 1972)("saturation search" defined in officer's testimony as large-scale search leaving "no stone unturned").

being conducted by police officers and F.B.I. agents would have inevitably revealed the evidence in the absence of the unlawfully secured statement.[61]

In the courts' efforts to determine the weight of probability essential to a judicial conclusion that evidence would have been inevitably discovered, several standards of proof have been employed.[62] While some commentary focused upon whether evidence "could," "would," or "probably would" have been inevitably discovered,[63] the critical issue of the appropriate burden of proof in cases embracing the inevitable discovery exception was resolved in contrastive forms. Some courts seem to have left the degree of inevitability unaddressed and instead have focused on the burden which the prosecutor must meet to show

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See generally LaCount & Girese, *supra* note 40, at 494-96 (discussing "saturation" investigations supporting inevitable discovery exception).

[61] *Gereau*, 502 F.2d at 927-28. The court noted that although the gun was out of sight, it was not concealed, nor lodged "in a location far removed from any place police had reason to search." *Id.* at 928.

Several other investigative procedures have bolstered findings of the applicability of the inevitable discovery exception. *See, e.g.*, United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir. 1970)(examination of wallet for identification purposes); Wayne v. United States, 318 F.2d 205, 209 (D.C. Cir. 1963)(evidence revealed in coroner's investigation); People v. Chapman, 67 Cal. Rptr. 601, 614 (3d Dist. Ct. App. 1968)(canvassing pawn shops pursuant to normal process of investigation); People v. Thomsen, 48 Cal. Rptr. 455, 460 (5th Dist. Ct. App. 1965)(routine search of abandoned auto).

[62] *See generally* LaCount & Girese, *supra* note 40, at 491-92 (discussion of burden of proof in application of inevitable discovery exception).

[63] *See* Comment, *supra* note 21, at 628. A few opinions have suggested that the inevitability standard is satisfied by a showing that the evidence "could," as distinguished from "would," have been procured. *See, e.g.*, United States v. O'Brien, 174 F.2d 341, 346 (7th Cir. 1949)(court denied motion to suppress evidence which police "could have found" pursuant to a legal search); Parts Mfg. Corp. v. Lynch, 129 F.2d 841, 842 (2d Cir. 1942)(information upon which search warrant was based "could easily have been supplied" without alleged illegality). *But see* United States v. Jackson, 448 F.2d 963, 970 (9th Cir. 1971)(speculative to conclude that but for illegality police "would not" have identified defendants); *cf.* United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962)("might have been discovered" standard held insufficient; test was one of actualities, not possibilities). The basic assumption is that the "would have been discovered" standard calls for a lesser degree of speculation than the other standards. Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 628 (1968).

The *Model Penal Code of Pre-Arraignment Procedures* provides that all fruits of unlawful searches and illegally obtained statements would be excluded "unless the prosecution establishes that such evidence *would* have *probably* been discovered" by law enforcement officers in spite of the original poison, and unless the court determines that "exclusion of such evidence is not necessary to deter violations of this code." *Model Penal Code of Pre-Arraignment Procedure* § 150.43 (Tent. Draft 1974)(emphasis added).

that the disputed evidence has not been tainted.[64] When the Second Circuit once again espoused the principle of inevitable discovery in *United States v. Falley*,[65] a preponderance of the evidence standard was adopted.[66] In *Falley*, an illegal search provided information which led to the discovery of the name and phone number of defendant's customs broker and certain incriminatory importation documents.[67] The United States Court of Appeals for the Second Circuit, stating that the government must prove by a preponderance of the evidence that the disputed evidence had not been "tainted," determined that "it would have been only a question of time" before the authorities would have discovered the importation documents and the identity of the broker.[68]

In *United States v. Matlock*,[69] a case in which the United States Supreme Court considered the admissibility *vel non* of evidence procured through a third-party consent search,[70] the Court maintained that the operative standard of proof at suppression hearings should be no greater than by a preponderance of the evidence.[71] In spite of Justice White's holding in *Matlock*, two circuits subsequently espoused a "clear and convincing" standard.[72] For example, in *Virgin Islands v. Gereau*,[73] the United States Court of Appeals for the Third Circuit held that to sustain admission of the murder weapon the prosecution must demonstrate by "clear and convincing" evidence that the weapon was not discovered via the illegally procured statement.[74] The court

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[64] *See infra* notes 65-74 and accompanying text.

[65] 489 F.2d 33 (2d Cir. 1973).

[66] *Id.* at 41.

[67] *Id.* at 40.

[68] *Id.* at 40-41. The court suggested that even if the evidence procured through the unlawful conduct had "shortened or facilitated" the investigatory procedures, it did not create "fruit sufficiently poisonous to be fatal." *Id.* at 40.

[69] 415 U.S. 164 (1971).

[70] *Id.* at 171. The Court stated that the validity of third-party consent searches rests upon mutual use of property by individuals sharing joint access or control of the premises, "so that it is reasonable to recognize that any of the cohabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at n.7.

[71] *Id.* at 178 n.14. In support of its holding, the Court cited Lego v. Twomey, 404 U.S. 477 (1972), in which the Court required voluntariness of confessions to be proved merely by a "preponderance" standard. *Id.* at 488-89.

[72] The Third Circuit and the Tenth Circuit adopted the clear and convincing standard. *See, e.g.*, United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982); Virgin Islands v. Gereau, 502 F.2d 914, 927 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); United States v. Archie, 452 F.2d 897, 898 (3d Cir. 1971).

[73] 502 F.2d 914 (3d Cir. 1974).

[74] *Id.* at 927. The defendant's statement in *Gereau* was not admitted, because it was

noted that the prosecution had indeed satisfied the burden of showing that the weapon was not fruit of the poisonous tree, because it would have inevitably been discovered.[75]

In addressing the burden of proof problem of inevitable discovery, the Tenth Circuit focused more directly on the degree of certainty accompanying the "hypothetical independent source" or "inevitable discovery" and recognized a stringent standard based on the reasoning that there must be "no doubt" that the authorities would have eventually discovered the controverted evidence.[76] A less stringent standard for establishing inevitable discovery was adopted by the Fifth Circuit in *United States v. Brookins*.[77] In *Brookins*, the court held that the identity of the prosecution's primary witness would have, to a "reasonable probability," been uncovered apart from the unlawful conduct.[78]

While there was certainly no uniform standard by which prosecutors were required to prove the inevitability of discovery, neither was there a definitely established standard which would dictate the effect of the officers' good or bad faith upon the applicability of the inevita-

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procured after he had indicated a desire to confer with attorneys. *Id.*

[75] *Id.* The Third Circuit adopted this same standard for proof in an earlier case involving a different exception to the exclusionary rule. *See* United States v. Archie, 452 F.2d 897, 898 (3d Cir. 1971)(applying independent source exception to unlawful line-up identification).

[76] *See* United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982). Focusing on the degree of certainty that the police would have lawfully uncovered the evidence later, the court determined that there was "no doubt" that the disputed evidence would clearly have been discovered through a lawful investigation already in process. *Id.* In *Romero*, marijuana was seized from the defendant by an officer who transgressed the permissible limits of a pat-down as recognized in Terry v. Ohio, 392 U.S. 1 (1968). *Romero*, 692 F.2d at 703. The court noted that in spite of the impermissible search, the evidence would have eventually been procured because another officer had smelled the odor of marijuana and that this, coupled with an earlier tip, would have given the officers probable cause to arrest the defendant and initiate a full-blown search incident to arrest. *Id.* at 704.

[77] 614 F.2d 1037 (5th Cir. 1980).

[78] *Id.* at 1042 n.2, 1048. Police held Brookins for 72 hours without permitting him to stand before a magistrate and questioned him regarding automobile thefts for over six hours. Assured that the information he was about to disclose was "off the record," Brookins made several incriminating statements and revealed the name of Holt, who subsequently became the prosecution's primary witness. *Id.* at 1040. The court concluded that an investigation into prior leads would have disclosed Holt's identity. *Id.* at 1048-49. The court determined that the prosecution was not required to show the "absolute inevitability" of the eventual discovery, but merely a "reasonable probability" that the disputed evidence would have been discovered lawfully. *Id.* at 1042 n.2; *see also* United States v. Roper, 681 F.2d 1354, 1358 (11th Cir. 1982)(adopting *Brookins* standard of "reasonable probability"), *cert. denied*, 459 U.S. 1207 (1983).

ble discovery exception.[79] The Eighth Circuit undertook an extensive discourse on the issue of an officer's bad faith in upholding the decision of the Iowa Supreme Court in the instant case.[80] The court reasoned that if there was to be an "inevitable discovery" or "hypothetical independent source" exception to the exclusionary rule, the prosecution should not reap the benefit of the rule without first proving that the police did not act in "bad faith."[81]

In the instant case, the United States Supreme Court determined that since the prosecution could establish by a preponderance of the

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[79] *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 447 (1974)(deterrence rationale loses force when police action was made in good faith rather than bad faith). To preserve the deterrent purpose of the exclusionary rule, some writers advocate the imposition of a good-faith requirement before invocation of the inevitable discovery exception. *See* LaCount & Girese, *supra* note 40, at 507-08 (inevitable discovery exception should require a showing of good faith); Comment, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137, 160 (1976)(inevitable discovery consistent with deterrence only where police do not act in bad faith).

[80] *See* Williams v. Nix, 700 F.2d 1164, 1169-73 (8th Cir. 1983)(consideration of good-faith conditions applied to inevitable discovery exception).

[81] *Id.* at 1169 n.5. The court, in affirming the good-faith requirement, went on to recognize that though some may criticize the court for its focus upon the conduct of the law enforcement officers rather than upon the conduct of the alleged murderer, such focus is necessary. The court suggested that our system of law, which makes certain conduct criminal, must also establish rules for the misconduct of government authorities, although imperfect results will occasionally occur. *Id.* at 1173. *See generally* Comment, *supra* note 21, at 647-50 (discussing significance of official misconduct in determining extent of the taint).

Regardless of the standards of proof or conditions of good faith, the inevitable discovery exception has been criticized as too speculative to be applied. *See* People v. Fitzpatrick, 32 N.Y.2d 499, 513, 300 N.E.2d 139, 146, 346 N.Y.S.2d 793, 803 (Watchler, J., concurring)(describing inevitable discovery as a "speculative theory with no discernible limits"), *cert. denied*, 414 U.S. 1050 (1973); Comment, *supra* note 21, at 628 (inevitable discovery exception too speculative to be viable). The exception has also been criticized as conflicting with constitutional requirements. *See* United States v. Alvarez-Porras, 643 F.2d 54, 64 (2d Cir.)(refused to risk "whittling down" warrant requirement by applying inevitable discovery to warrantless search), *cert. denied sub nom.* Garcia-Perez v. United States, 454 U.S. 839 (1981); United States v. Griffin, 502 F.2d 959, 961 (6th Cir.)(application of inevitable discovery to evidence procured through warrantless search would emasculate fourth-amendment warrant requirement), *cert. denied*, 419 U.S. 1050 (1974); LaCount & Girese, *supra* note 40, at 506 (inevitable discovery in "direct conflict with fourth amendment search and seizure requirements"). Commentators have also argued that the exception runs directly counter to the deterrent rationale of the exclusionary rule. *See, e.g.*, Pitler, *supra* note 63, at 630 (inevitable discovery collides with deterrence rationale supporting the exclusionary rule); Note, *supra* note 40, at 99-100 (rule would encourage police shortcuts when evidence could be more easily obtained by unlawful means).

evidence that the child's body would have been discovered by lawful means,[82] the deterrence rationale for exclusion had such limited justification that the evidence should not be suppressed.[83] Expressing the view that police should not be put in a worse posture than that in which they would have been had no illegal conduct occurred,[84] the Court reasoned that since withholding from evidence facts which would have been discovered by police absent any police misconduct would indeed put police in a worse position,[85] then there should be *no* requirement that the prosecution prove an absence of bad faith in order to receive the benefit of the inevitable discovery exception.[86] The Court noted further that since the presence of counsel in the patrol car would in no way fortify the reliability of the inevitably discovered evidence,[87] exclusion of the ultimately discovered evidence would add nothing to the integrity or fairness of the trial.[88] Finally, the Court held that since

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[82] *Nix*, 104 S. Ct. at 2509. As to the quantum of proof, the Court looked to the guidelines set forth in United States v. Matlock, 415 U.S. 164, 178 n.14 (1974), and expressed an unwillingness to levy additional burdens on the "already difficult task of proving guilt in criminal cases. . . ." *Nix*, 104 S. Ct. at 2509 n.5. Stating that the newly adopted exception focused not on speculation, but on "demonstrated historical facts capable of ready verification or impeachment," the Court found no reason to depart from the usual burden of proof required at suppression hearings and distinguished the instant case from United States v. Wade, 388 U.S. 218 (1967), where "clear and convincing" evidence was required to show an independent source for an in-court identification. *Nix*, 104 S. Ct. at 2509 n.5.

[83] *Nix*, 104 S. Ct. at 2509.

[84] *Id.* Although admitting that the independent sources exception was not applicable in the instant case, the Court nevertheless looked to the teachings of that doctrine which dictates that society's interest in deterring police misconduct and in having "juries receive all probative evidence of a crime" is most appropriately served by putting police in "the same, not a worse" posture than that in which they would have been had no police misconduct transpired. *Id.* The Court likened the purposes of the inevitable discovery rule to that of the "harmless-error" rule of Chapman v. California, 386 U.S. 18, 22 (1967). *Nix*, 104 S. Ct. at 2509 n.4.

[85] *Nix*, 104 S. Ct. at 2509, 2511.

[86] *Id.* at 2510. The Court rejected the conclusion of the Eighth Circuit that in the absence of a good-faith condition to the inevitable discovery "the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the exclusionary rule reduced too far." *Id.* According to the Court, the "societal costs" of putting police in a worse position by suppressing the evidence under the exclusionary rule "far outweigh the benefits to deterrence that a good-faith requirement might produce." *Id.*

[87] *Id.* at 2511. The conclusion of the Court was that under the circumstances the prosecution did not gain any advantage at trial, nor did the defendant suffer any prejudice. *Id.*

[88] *Id.* at 2510-11. The Court found no nexus sufficient to poison the disputed evidence when, as here, the evidence "would inevitably have been discovered without refer-

application of the inevitable discovery exception would merely place the defendant and the state in the same posture as that in which they would have been had there been no misconduct,[89] then the argument that the exception affects an "impermissible balancing of values" had no merit and the evidence should have been admitted.[90]

In the dissent, Justice Brennan agreed with the majority's adoption of the inevitable discovery exception.[91] He reasoned, however, that since the evidence sought to be introduced was not actually discovered through an independent source, and since the evidence only hypothetically would have been discovered independently,[92] then to protect fully the purpose of the exclusionary rule, a burden of proving the inevitable discovery by clear and convincing evidence should rest upon the prosecution.[93]

The adoption by the United States Supreme Court of the "inevitable discovery" exception to the exclusionary rule stands as a forceful bridle upon the expansive reach of the exclusionary rule first recognized over seventy years ago.[94] The new exception to the exclusionary rule marks the Court's recognition that, particularly when the prosecution can meet the burden of showing that police would have inevitably procured the disputed evidence by legitimate means, society cannot permit the prohibition of valuable and reliable evidence and the concurrent release of the guilty criminals.[95] Admittedly, the exclusionary rule is a bulwark necessary for the protection of human liberties and a deterrent to the overreaching arm of law enforcement officials.[96] These objectives, however, will not be hampered by adoption of the inevitable discovery doctrine.[97] Cautious application of the inevitable discovery

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ence to the police error or misconduct." *Id.* at 2511.

[89] *Id.* at 2509.

[90] *Id.* at 2511. Although Williams contended that the societal costs of excluding the evidence could not be balanced against his sixth-amendment rights, the Court disagreed. *Id.* at 2510. Justices White and Stevens wrote separate concurring opinions. *Id.* at 2513-17.

[91] *Id.* at 2517 (Brennan, J., dissenting).

[92] *Id.*

[93] *Id.* at 2517-18. Justice Brennan suggested that a more stringent burden of proof "serves to impress the factfinder with the importance of the decision and thereby reduces the risk that illegally obtained evidence will be admitted." *Id.*

[94] *See supra* note 22 and accompanying text.

[95] *See* LaCount & Girese, *supra* note 40, at 511 (concluding that societal interest warrants limited suppression in cases of genuine inevitable discovery).

[96] *See Nix*, 104 S. Ct. at 2508-09 (Supreme Court acknowledging necessity of exclusionary rule to ensure protection against police misconduct).

[97] *See id.* at 2509 (rationale of inevitable discovery justifies adoption of exception to exclusionary rule); *see also* LaCount & Girese, *supra* note 40, at 512 (inevitable discovery

exception will not infringe upon individual freedoms, nor will it emasculate the necessary deterrent force behind the exclusionary rule.[98] Although the Court expressly recognized the doctrine as an exception to the exclusionary rule,[99] it is apparent that except for in a few instances, application of the exception will be limited to secondary evidence derived from the illegally procured primary evidence.[100] Given both the reality that the inevitable discovery exception will have limited application to primary evidence, and the availability of other exceptions to the exclusionary rule (such as independent sources and attenuation),[101] the new exception in and of itself should not, as some critics have suggested, undermine the policies inherent in the exclusionary rule.[102] As the Court recognized in *Nix*,[103] an evenhanded application of the inevitable discovery exception furnishes the prosecution with a fair chance to "untaint" valuable and probative evidence,[104] without conferring upon police officers the privilege of unlawfully and knowingly violating a defendant's constitutional rights.[105] Finally, the Court has adopted a well-founded response to the question of exactly what burden of proof must be met when it seized upon the logical conclusion that if at least a "preponderance of the evidence" shows that the disputed evidence would have inevitably been discovered, then there is no reason to suppress the evidence.[106]

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will not stand in way of exclusionary rule objectives).

[98] *See* Note, *supra* note 40, at 103 (exception can be applied to protect societal interest and provide necessary deterrence).

[99] *Nix*, 104 S. Ct. at 2507, 2509.

[100] *See generally* LaCount & Girese, *supra* note 40, at 506-09 (noting that exception will have greatest application to secondary evidence). By its nature, the inevitable discovery exception will not logically apply to situations where, for example, a witness would have divulged information even if the arresting officers had given the necessary *Miranda* warnings. *Id.* at 508 n.118.

[101] *See supra* note 39.

[102] *See, e.g.*, Pitler, *supra* note 63, at 630 (exception collides with deterrence rationale of exclusionary rule); Comment, *supra* note 21, at 630 (exception too speculative to be viable).

[103] *Nix*, 104 S. Ct. at 2511.

[104] *See* Note, *supra* note 40, at 103 (speaking of viability of fair application of inevitable discovery).

[105] *See Nix*, 104 S. Ct. at 2510 (suggesting that when officers know of likely inevitable discovery, there will be no gain from "shortcuts" and police will try to avoid "questionable" practices).

[106] It seems inherently more sound to focus simply and directly upon the degree of certainty that the disputed evidence would have been inevitably discovered, as the Court

did in the instant case, than to take the "back door" approach. *See supra* notes 62-73 and accompanying text. The courts in these prior cases sought to find an absence of "taint" (which in fact there was not). Indeed there is tainted evidence present in all inevitable discovery cases, and no quantum of proof will remove the taint. In the instant case, however, the Court, acknowledging the actual taint, looked to a quantum of proof showing that the disputed evidence would inevitably have been procured in spite of the initial taint. The burden that the prosecution must meet, therefore, is a preponderance of the evidence. The prosecution need not prove an absence of tainted evidence because the evidence would inevitably have been discovered even without the aid of the initial poison.

Torts - Negligence - Social Host Who Serves Alcoholic Beverages to Intoxicated Adult Guest Liable for Injuries Caused by Negligence of that Guest

Plaintiff[1] brought a tort action in the Law Division of the New Jersey Superior Court against defendant social hosts[2] who had served liquor to a guest[3] who was subsequently involved in an automobile accident with the plaintiff.[4] The plaintiff alleged that the hosts were negligent in continuing to serve a visibly intoxicated guest alcohol[5] when they knew that he intended thereafter to operate an automobile.[6] On motion for summary judgment, the hosts asserted that as a matter of law a social host who serves alcohol to an intoxicated adult guest is not liable to third persons injured by the negligence of the guest.[7] The trial court granted the motion,[8] and the Appellate Division of the New Jersey Superior Court affirmed.[9] On appeal, the Supreme Court of New

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[1] The plaintiff was Marie Kelly. Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219, 1220 (1984).

[2] The defendant social hosts were Joseph Zak and his wife, Catherine. *Kelly*, 476 A.2d at 1219, 1220.

[3] The guest was defendant Donald Gwinnell who, according to the Zaks, had consumed no more than three drinks of scotch on ice during his one or two hour visit at the Zaks' home. *Id.* at 1220.

[4] *Id.* The plaintiff was seriously injured in the accident and subsequently brought a personal injury action against defendants Gwinnell, the drunken driver, and Paragon Corporation, Gwinnell's employer and owner of the vehicle. Kelly v. Gwinnell, 190 N.J. Super. 320, 463 A.2d 387, 388 (App. Div. 1983). After Gwinnell and Paragon filed a third-party action against the Zaks, the plaintiff amended her complaint to include the Zaks as defendants. *Kelly*, 463 A.2d at 388.

[5] *See Kelly*, 476 A.2d at 1221-22. Based on a blood test taken after the accident which showed that Gwinnell's blood alcohol concentration was 0.286%, the plaintiff's expert witness concluded that Gwinnell had consumed approximately 13 drinks. *Id.* at 1220. He further concluded that Gwinnell was unquestionably intoxicated while at the Zaks' home as well as at the time of the accident. *Id.* The court noted that a person having a blood alcohol concentration of 0.10% or more who operates a motor vehicle is in violation of N.J. Stat. Ann. § 39-4-50 (West 1973 & Supp. 1984-1985). *Kelly*, 476 A.2d at 1220 n.1.

[6] *See Kelly*, 476 A.2d at 1221-22.

[7] *Id.* at 1220-21.

[8] *Id.* at 1221.

[9] Kelly v. Gwinnell, 190 N.J. Super. 320, 463 A.2d 387, 389 (App. Div. 1983). The appellate court noted that under New Jersey law a supplier of liquor could only be held liable to a third person for the negligence of an intoxicated person if the supplier was a tavern owner or a social host of a minor. *Kelly*, 463 A.2d at 388. The court reasoned that

Jersey, *held*, reversed and remanded. A social host who provides intoxicating beverages to a visibly intoxicated adult guest, with knowledge that the guest will be operating a motor vehicle shortly thereafter, may be liable for injuries to third persons resulting from the negligent drunken driving of the guest. *Kelly v. Gwinnell,* 96 N.J. 538, 476 A.2d 1219 (1984).

At common law, neither social nor commercial suppliers of intoxicating liquors were liable for the subsequent acts of an inebriated guest.[10] The underlying rationale for the rule was that the consumption, not the supply, of alcohol was the proximate cause of any injury resulting from the negligence of an intoxicated guest.[11] With the advent of the temperance movement in the mid-1800's, however, some states modified the common law rule by enacting dram shop or civil damage acts which imposed liability on the sellers of alcoholic beverages for injuries caused by the negligence of intoxicated guests.[12] Simi-

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since prior case law had not expanded liability to include a social host who serves an adult guest, then the defendant hosts could not be liable. *Id.* at 389-91. The plaintiff's claims against defendants Gwinnell and Paragon Corporation were not affected by the granting of the defendant hosts' motion for summary judgment and remained pending in the trial court. *Kelly*, 476 A.2d at 1221.

[10] *See* Cruse v. Aden, 127 Ill. 231, 20 N.E. 73, 74 (1889) (no tort at common law to dispense liquor to "strong able-bodied" men); Peacock v. Oaks, 85 Mich. 578, 48 N.W. 1082, 1084 (1891) (no remedy available outside dram shop act for injuries caused by the furnishing of liquor to another); *see also* Megge v. United States, 344 F.2d 31, 32 (6th Cir.) (selling or supplying of liquor could not give rise to tort at common law), *cert. denied*, 382 U.S. 831 (1965); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682, 687 (1958) (same).

[11] Vesely v. Sager, 5 Cal. 2d 153, 158-59, 486 P.2d 151, 155, 95 Cal. Rptr. 623, 627 (1971); *see also* Nolan v. Moselli, 154 Conn. 432, 226 A.2d 383, 386 (1967) (liquor is not intoxicating until consumed). In actions to recover for the death or injury of the imbiber, some courts held that the imbiber's consumption constituted contributory negligence which barred recovery. *See, e.g.*, King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119, 121-22 (1886) (no recovery possible where deceased voluntarily drank alcohol); Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450, 457 (1955) (imbiber's consumption was contributory negligence which barred recovery), *overruled*, Vesely v. Sager, 5 Cal. 2d 153, 167, 486 P.2d 151, 160, 95 Cal. Rptr. 623, 632 (1971). *But see* Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648, 651-52 (1958) (imbiber's contributory negligence not a bar to recovery).

[12] *See* NATIONAL ALCOHOLIC BEVERAGE CONTROL ASS'N, INC., A COMPILATION OF DRAM SHOP STATUTES AND JUDICIAL RULINGS 2-4 (4th ed. 1984) [hereinafter cited as DRAM SHOP STATUTES]. Dram shop statutes, which were the direct result of the temperance movement, were originally designed to show disapproval of intoxicating liquor and its sale. Hagglund & Arthur, *Common Law Liquor Liability*, 7 FORUM 73, 73 (1971). In 1849, Wisconsin became the first state to enact a dram shop statute, and by the mid-1870's, 11 states had followed suit. DRAM SHOP STATUTES, *supra*, at 3-4. These first statutes placed time, place and customer restrictions on the sale of liquor and required shopkeepers to post bonds conditioned upon compliance with the restrictions. Hagglund & Arthur,

larly, a few courts recognized a common law cause of action against commercial suppliers who served consumers that were known to be unable to control their consumption.[13] Other jurists imposed civil liability on commercial suppliers by inferring a standard of care from criminal statutes that provided penalties for supplying alcoholic beverages to certain classes of persons.[14]

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supra, at 73. As dram shop statutes gained support, they were broadened to prohibit sales to minors, intoxicated persons, and habitual drunkards. *Id.* at 73-74. By 1918, as many as 30 states had enacted legislation to restrict liquor sales, 28 of which prohibited the sale of alcoholic beverages completely. *Id.* at 73.

In 1919, Congress ratified the eighteenth amendment which prohibited "the manufacture, sale or transportation of intoxicating liquors within . . . the United States . . . ." U.S. CONST. amend. XVIII, § 1. Prohibition continued until December 5, 1933 when the twenty-first amendment was ratified to repeal the eighteenth amendment. *See* Hagglund & Arthur, *supra*, at 74; *see also* U.S. CONST. amend. XXI, § 1.

After the repeal of the eighteeth amendment, many dram shop acts remained effective, *see, e.g.*, MINN. STAT. ANN. § 340.95 (West 1972 & Supp. 1985) (originally enacted in 1858), and as of August of 1984, 23 states had effective dram shop acts. DRAM SHOP STATUTES, *supra*, at 6-8. These states were Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Maine, Michigan, Minnesota, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Vermont and Wyoming. Nineteen jurisdictions, which included Arizona, Colorado, District of Columbia, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New Jersey, New Mexico, North Carolina, Oregon, South Dakota, Washington, Wisconsin and Wyoming, allowed some form of common law action for the negligent distribution of alcohol. Only fourteen states, Arkansas, Delaware, Kansas, Maryland, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia, offered no remedy. *Id.*

[13] *See, e.g.*, Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147, 148, 151-52 (1940) (alcoholic's wife allowed to bring action for loss of consortium against sellers of alcoholic beverages who sold alcohol to husband despite knowledge of husband's intemperate propensities); Vesely v. Sager, 5 Cal. 3d 153, 159 n.3, 486 P.2d 151, 155 n.3, 95 Cal. Rptr. 623, 627 n.3 (1971) (citing McCue v. Klein, 60 Tex. 168 (1883)) (tavern owner liable to individual that he induced to drink past point of intoxication); *cf.* Holleman v. Harward, 119 N.C. 150, 25 S.E. 972, 973-75 (1896) (druggist liable for selling laudanum to known addict); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102, 105 (1912) (wife allowed to maintain loss of consortium action against pharmacist who sold morphine to addict husband).

Most courts, however, would not recognize a common law cause of action against commercial suppliers in absence of statutory guidance. *See, e.g.*, Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530, 531, 534 (1949) (tavern owner not liable for injuries resulting from negligence of intoxicated minor patron because state had no civil damage law); Histon v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952, 955 (1944) (no common law liability for supplier of intoxicating liquor); State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754, 757 (1951) (dram shop owner not liable for negligence of patrons absent statutory imposition of liability).

[14] *See, e.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322, 325-26 (7th Cir. 1959) (violation of criminal statute which prohibited sale of alcohol to inebriates gave rise to cause of action in tort), *cert. denied sub nom.* Saxner v. Waynick, 362 U.S. 903

For example, in *Rappaport v. Nichols*,[15] the New Jersey Supreme Court held that a plaintiff whose decedent was fatally injured by the actions of an intoxicated minor[16] had a common law negligence action against the tavern keepers who had served alcohol to the minor.[17] In so holding, the court emphasized that the tavern keepers had violated a state regulation which prohibited the sale of alcoholic beverages to minors and intoxicated persons.[18] This regulation, the court stated, was intended to protect the general public as well as the minor or inebriate;[19] therefore, violation of the regulation could be used as evidence of the defendants' negligence.[20] The *Rappaport* court also pointed out that the unreasonable risk of harm to the public that would be created by dispensing liquor to minors and inebriates was foreseeable[21] and

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(1960); Lewis v. State, 256 N.W.2d 181, 189 (Iowa 1977) (statute which prohibited sale of liquor to minor set minimum standard of care); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648, 651 (1958) (violation of criminal statute intended to protect others constituted negligence). *But see* Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383, 389-90 (1967) (where dram shop act did not provide remedy, remedy was unavailable); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886, 895 (dram shop act sole remedy). *See generally* Note, *Liability of Liquor Vendors to Third Party Victims*, 56 NEB. L. REV. 951, 954-58 (1977) (discussion of commercial supplier's negligence liability arising from criminal statutes).

[15] 31 N.J. 188, 156 A.2d 1 (1959).

[16] *Rappaport*, 156 A.2d at 3. The plaintiff's decedent was involved in an automobile accident with the intoxicated minor and died from injuries received in the accident. *Id.*

[17] *Id.* at 9.

[18] *Id.* at 8. For the current version of the state regulation involved, see N.J. ADMIN. CODE tit. 13, § 2-23.1 (Supp. 1984) (formerly New Jersey Alcoholic Beverage Control Reg. 20, R.1). The court also pointed out that the legislature had prohibited liquor sales to minors because of the danger inherent in selling liquor to such persons. *Rappaport*, 156 A.2d at 8; *see* N.J. STAT. ANN. § 33-1-77 (West Supp. 1984-85).

[19] *Rappaport*, 156 A.2d at 8.

[20] *Id.* at 9. Violation of a regulation or statute providing criminal punishment has generally implied a cause of action in tort where the injured person was within the class the statute intended to protect and the injury was of the type sought to be prevented. W. PROSSER & W. KEATON, THE LAW OF TORTS § 36, at 224-25 (5th ed. 1984); *see* Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543, 543 (1889) (violation of act which required poisonous chemicals to be clearly labeled constituted negligence); U-Haul Co. v. White, 232 So. 2d 705, 708 (Miss. 1970) (violation of safety statute negligence per se where person injured was member of class statute sought to protect and injury was type statute sought to prevent); *see also* RESTATEMENT (SECOND) OF TORTS §§ 286-288C (1965) (general analysis of standard of conduct implied by legislation).

The *Rappaport* court pointed out, however, that the defendants could overcome this evidence of negligence by asserting that they had no actual or constructive knowledge of the patron's minority or intoxicated state and that they acted reasonably under the circumstances. *Rappaport*, 156 A.2d at 9.

[21] *Id.* at 8. The *Rappaport* court considered the foreseeability of injury to others to be an indication of the existence of a duty. *See id.* at 8-9. However, foreseeability has

that, because of this foreseeability, the minor's negligent driving was not an intervening cause that would vitiate the vendor's conduct.[22] In conclusion, the court stated that a common law negligence action for the unlawful and negligent sale of liquor could be maintained but that such a cause of action was only available against commercial vendors.[23]

Six years later, the New Jersey Supreme Court reaffirmed *Rappaport* in *Soronen v. Olde Milford Inn, Inc.*[24] In *Soronen,* the defendant tavern keeper served alcohol to a visibly intoxicated adult patron[25] who, upon standing to leave, fell and fractured his skull, resulting in his death.[26] Relying heavily on *Rappaport,* the court held that under New Jersey regulatory law[27] there was an implied right of

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also been considered to be an element of proximate cause. W. PROSSER & W. KEATON, *supra* note 20, § 43, at 297-300. The former view had its genesis in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), in which Judge Cardozo explained:

> One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.

Palsgraf, 162 N.E. at 101. Under either view, however, the fundamental question remains one of public policy. W. PROSSER & W. KEATON, *supra* note 20, § 43, at 280-81. The custom of the community is relevant to a determination of public policy and, therefore, to the existence of a duty. *See id.* § 33, at 193. Nevertheless, as stated by Judge Learned Hand, "there are precautions so imperative that even their universal disregard will not excuse their omission." New England Coal & Coke Co. v. Northern Barge Corp., 60 F.2d 737, 740 (2d Cir. 1932).

[22] *Rappaport,* 156 A.2d at 9. The court applied the general rule that foreseeable intervening causes do not supersede a tortfeasor's negligence. *Id.*; *see also* W. PROSSER & W. KEATON, *supra* note 20, § 44, at 303 (foreseeable intervening causes do not vitiate defendant's negligence); RESTATEMENT (SECOND) OF TORTS § 443 (1965) (normal intervening cause is not a superseding cause). Consequently, the court concluded that a jury could find that the defendant's conduct was a substantial factor in the occurrence of the plaintiff's injury and, therefore, was a proximate cause of the injury. *Rappaport,* 156 A.2d at 9; *see also* W. PROSSER & W. KEATON, *supra* note 20, § 41, at 268 (discussion of substantial factor rule of proximate causation).

[23] *Rappaport,* 156 A.2d at 10. The court specifically stated that its decision did not apply to persons not in the liquor business or to liquor licensees who were selling liquor lawfully and with reasonable care. *Id.*

[24] 46 N.J. 582, 218 A.2d 630, 634 (1966).

[25] *Soronen,* 218 A.2d at 631-32. The evidence indicated that the patron had been drinking before he entered the defendant's bar and that while in the bar, he was served two shots of whiskey and three beers in a two hour period. *Id.*

[26] *Id.* at 632. The defendant made no effort to aid his injured patron because he felt it was "not his 'place.'" *Id.*

[27] *See* N.J. ADMIN. CODE tit. 13 § 2-23.1 (Supp. 1984) (formerly New Jersey Alcoholic Beverage Control Reg. 20, R.1).

action against licensees who served alcoholic beverages to visibly intoxicated adults.[28] The court further held that the inebriate's contributory negligence was not an available defense to the claim since allowing such a defense would nullify the protection afforded by the regulation.[29]

While the New Jersey Supreme Court, through *Rappaport* and *Soronen*, allowed a negligence cause of action against tavern keepers who served liquor to minors and inebriates,[30] other state courts have allowed such a cause of action against social hosts who acted similarly.[31] For example, in *Wiener v. Gamma Phi Chapter of Alpha Tau*

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[28] *See Soronen*, 218 A.2d at 636. The court emphasized that the defendant's duty to refuse to serve liquor to a visibly intoxicated patron was incorporated in a long-standing regulation which expressly prohibited the service of liquor to anyone who was " 'actually or apparently intoxicated.' " *Id.* at 633 (quoting Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1, 9 (1959)). However, the court noted that, unless the patron was visibly intoxicated, extension of liability to the purveyor would impose an undue burden. *Id.* at 637.

[29] *Id.* at 636; *see also* Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648, 651-52 (1958) (contributory negligence no defense to violation of statute prohibiting liquor sales to minors and inebriates). *Compare* RESTATEMENT OF TORTS § 483 (1934) (contributory negligence no defense to violation of statute protecting persons unable to protect themselves) *with* RESTATEMENT (SECOND) OF TORTS § 483 (1965) (contributory negligence bars recovery unless statute places entire responsibility for injury on defendant).

Due to the harshness of the doctrine of contributory negligence, many states developed a comparative negligence approach. W. PROSSER & W. KEATON, *supra* note 20, § 67, at 468-79 (discussing comparative negligence); *see, e.g.*, Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973) (cause of action no longer defeated by contributory negligence); Munford, Inc. v. Peterson, 368 So. 2d 213, 214-15, 219 (Miss. 1979) (contributory negligence allowable defense against wrongful death claim brought by parents of minor passenger who was killed in car wreck after he and his friends consumed large quantities of beer purchased from defendant).

The Mississippi comparative negligence statute provides that "damages shall be diminished . . . in proportion to the amount of negligence attributable to the person injured. . . ." MISS. CODE ANN. § 11-7-15 (1972). However, most states have not allowed apportionment between joint tortfeasors. *See* W. PROSSER & W. KEATON, *supra* note 20, § 67, at 475 (most comparative negligence states still apply rule of joint and several liability between co-defendants). In New Jersey, for example, joint tortfeasors are entitled to contribution on a pro rata basis. N.J. STAT. ANN. § 2A: 53A-2 (West 1952). Failure of a defendant in a tort action to bring a third-party claim against co-tortfeasors does not defeat his right to seek contribution from them in a separate action. Sattelberger v. Telep, 14 N.J. 353, 102 A.2d 577, 586 (1954). However, the jury is not permitted to apportion damages among joint tortfeasors according to fault. Theobold v. Angelos, 40 N.J. 295, 191 A.2d 465, 470 (1963). *But see* Brown v. Keill, 224 Kan. 195, 580 P.2d 867, 875 (1978) (damages apportioned between joint tortfeasors according to fault).

[30] *See supra* text accompanying notes 16-17, 23, 27-28.

[31] *See, e.g.*, Thaut v. Finely, 50 Mich. App. 611, 213 N.W.2d 820, 821-22 (1973) (violation of penal statute making it unlawful to serve liquor to minors gave rise to civil cause of action against server); *cf.* Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150,

Omega Fraternity,[32] the Oregon Supreme Court recognized a common law negligence action against a fraternity which, while hosting a party, negligently distributed intoxicating beverages to an inebriated minor guest who subsequently injured a third person.[33] Although the court refused to predicate liability on an Oregon statute providing criminal punishment for the service of alcohol to minors,[34] it did hold that in circumstances where a social host has reason to know that a guest is already intoxicated, or is likely to behave unreasonably under the influence of alcohol, a duty to discontinue service arises.[35]

The California Supreme Court reached a similar conclusion in *Coulter v. Superior Court*.[36] In *Coulter*, the court held that a noncommercial supplier of alcoholic beverages, who served alcohol to an obviously intoxicated adult guest, knowing that the guest would thereafter drive himself home, was liable for injuries to third persons resulting from the inebriated guest's negligence.[37] The court initially determined that civil liability could be imposed on the defendant for his violation

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152, 156-58 (1974) (social host who served liquor to minor in violation of state dram shop act held liable for injuries caused to third parties by intoxicated minor); Williams v. Klemesrud, 197 N.W.2d 614, 614-16 (Iowa 1972) (third parties injured by intoxicated minor allowed right of action under state dram shop act against social host who provided minor with liquor); Ross v. Ross, 294 Minn. 115, N.W.2d 149, 152-53 (1972) (legislative intent in enacting dram shop act was to provide a cause of action against "any person" who served liquor to a minor, including a social host).

[32] 258 Or. 632, 485 P.2d 18 (1971).

[33] *Wiener*, 485 P.2d at 23. The plaintiff was injured when the minor drove the car in which the plaintiff was a passenger into a building. *Id.* at 20.

Although the court allowed the plaintiff to proceed against the fraternity, it affirmed dismissal of the plaintiff's claims against an adult member of the fraternity who purchased the alcoholic beverages and the owners and lessors of the premises on which the beverages were served. *Id.* at 22. The court reasoned that since a host may choose to serve whomever he desires, these defendants, having no direct control over the alcohol's distribution, owed no duty to the plaintiff. *Id.*

[34] *Id.* at 21. The court reasoned that Or. Rev. Stat. § 471.410(2) (1983), which made service of alcohol to minors a misdemeanor, was enacted to protect minors from the vices of alcohol, not to protect the public from the negligence of intoxicated youths; hence, violation of the statute did not constitute negligence per se. *Wiener*, 485 P.2d at 21.

[35] *Id.* at 21-22, 23. In 1979, the Oregon legislature enacted Or. Rev. Stat. §§ 30.955-.960 (1983). Section 30.955 provides that no social host shall be liable for damages caused by his intoxicated guests unless the guests were visibly intoxicated at the time the social host served them alcoholic beverages. Section 30.960 provides that no one who supplies alcohol to a minor shall be liable for the subsequent negligence of the minor unless a reasonable person would have requested identification or would have known the identification presented was altered or inaccurate. *Id.*.

[36] 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

[37] *Id.* at 147, 152-53, 577 P.2d at 670, 673-74, 145 Cal. Rptr. at 535, 538-39.

of a California statute which provides criminal punishment for the supply of any alcoholic beverage to an obviously intoxicated person.[38] It then found that, independent of such legislation, the defendant was liable under general negligence law.[39] In conclusion, the court noted that due to the recent escalation in alcohol related traffic fatalities and injuries, public policy required social hosts to temper their hospitality with reasonable restraint.[40] However, the rule established in *Coulter*

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[38] *Id.* at 150-52, 577 P.2d at 672-73, 145 Cal. Rptr. at 537-38. *See* CAL. BUS. & PROF. CODE § 25602 (West 1964) (amended 1978) ("[e]very person" supplying alcohol to intoxicated person guilty of misdemeanor). Prior to *Coulter*, § 25602 had not been applied to extend liability beyond commercial licensees. *See* Vesely v. Sager, 5 Cal. 3d 153, 165-66, 486 P.2d 151, 159-60, 95 Cal. Rptr. 623, 631-32 (1971) (section 25602 imposed a standard of care on commercial vendors). The *Coulter* court, however, extended its application to noncommercial suppliers, rejecting defendant's argument that because § 25602 was within the Business and Professions Code it should only be applied to commercial vendors. *Coulter*, 21 Cal. 3d at 150, 577 P.2d at 672, 145 Cal. Rptr. at 537.

[39] *Id.* at 152-53, 577 P.2d at 673-74, 145 Cal. Rptr. at 538-39. The court based its determination of the existence of a duty on six factors in addition to the foreseeability of harm including:

> The degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539 (quoting Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968)).

[40] *Coulter*, 21 Cal. 3d at 154, 577 P.2d at 675, 145 Cal. Rptr. at 540. The court noted that in 1976 over a quarter of a million people were arrested in California for driving under the influence of alcohol and that alcohol was the "primary collision factor" in 28.3% of California traffic fatalities and 11.0% of California traffic injuries. *Id.*, 577 P.2d at 675, 145 Cal. Rptr. at 540.

On April 14, 1982, President Reagan established the Presidential Commission on Drunk Driving mandating it to generate support for more stringent drunken driving laws. Exec. Order No. 12,358, 3 C.F.R. 179 (1983). The Commission discovered that, during the years 1973 through 1983, 250,000 Americans were killed in alcohol related automobile accidents; 50% of all traffic deaths involved alcohol use; and the resulting annual economic loss was between 21 and 24 billion dollars. *The Presidential Commission on Drunk Driving, Final Report* 1 (Nov. 1983). The Commission concluded that underlying these losses was a societal attitude which accepted the custom of driving automobiles to and from social functions while under the influence of alcohol as well as the general attitude that people are not responsible for the intoxicated behavior of their friends. *Id.* The Commission recommended, inter alia, educating potential social hosts about methods of entertaining which do not encourage alcohol abuse and methods of preventing intoxicated guests from driving. *Id.* at 10. It also recommended that all states raise the minimum drinking age to 21, *id.*, and enact dram shop laws imposing liability on "any person" who serves alcohol to a visibly intoxicated person. *Id.* at 11; *see* Highway Safety

proved ephemeral: within the year, the California legislature amended existing statutory law to expressly abrogate the holding in *Coulter* and bar all such actions against social hosts.[41]

The first New Jersey case to extend common law negligence liability to social hosts was *Linn v. Rand*.[42] In *Linn*, the plaintiff was struck by an automobile driven by a minor who had been served large amounts of alcohol by the defendant social host.[43] Reversing the trial court's grant of summary judgment in favor of the defendant, the Appellate Division of the New Jersey Superior Court determined that the immunity claimed by the social host was not dissimilar to other common law immunities which had previously been judicially abrogated.[44] Accordingly, the court held that a jury could properly find that a social host who served liquor to a visibly intoxicated minor, knowing the minor intended to operate an automobile in the near future, was negligent and that his negligence was the proximate cause of the plaintiff's injuries.[45]

Act of 1982, 23 U.S.C. § 408 (Supp. 1984) (federal highway funds conditioned on state implementation of various alcohol traffic programs).

[41] *See* CAL. CIV. CODE § 1714 (West Supp. 1984) (counterpart of CAL. CIV. CODE § 1714); *cf.* Cory v. Shierloh, 29 Cal. 3d 430, 437-40, 629 P.2d 8, 11-13, 174 Cal. Rptr. 500, 503-05 (1981) (1978 amendments held constitutional).

[42] 140 N.J. Super. 212, 356 A.2d 15 (1976).

[43] *Linn*, 356 A.2d at 16. The plaintiff, an infant pedestrian, brought a personal injury action individually and by his guardian ad litem against the social host. The plaintiff alleged that the defendant host was negligent for serving the minor an excessive amount of alcoholic beverages and afterwards allowing her to drive from his home. *Id.*

[44] *Id.* at 18-19; *see, e.g.*, Guterman v. Guterman, 66 N.J. 69, 328 A.2d 233, 234 (1974) (intrafamilial immunity in automobile cases abrogated); Immer v. Risko, 56 N.J. 482, 267 A.2d 481, 488 (1970) (interspousal immunity abrogated); Willis v. Department of Conservation & Economic Dev., 55 N.J. 534, 264 A.2d 34, 37 (1970) (sovereign tort immunity abrogated); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12, 17 (1965) (tortfeasor's immunity from liability for emotional distress in absence of physical contact abolished); Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276, 287 (1958) (charitable hospital immunity abolished).

The court reasoned that since it had extended liability to liquor licensees, it would be nonsensical to grant immunity to social hosts who had committed the same wrongful conduct, merely because the host was unlicensed. *Linn*, 356 A.2d at 17-18.

[45] *Id.* at 19. The court only briefly mentioned N.J. STAT. ANN. § 33:1-77 (West Supp. 1984-1985) (sale of alcoholic beverages to minors prohibited). *See Linn*, 356 A.2d at 17 n.1. Arguably the court's decision was grounded in ordinary negligence. *See Linn*, 356 A.2d at 18 ("plaintiff should be given his day in court to prove that . . . [defendant's] negligence was the proximate cause of the accident and plaintiff's injuries").

In Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564, 565 (Law Div. 1982), the Law Division of the New Jersey Superior Court extended this duty of the social host to intoxicated adult guests. Relying on *Rappaport, Soronen* and *Linn*, the court reasoned that just as no justifiable distinction existed between the service of alcohol by a licensee and

In the instant case, the court determined that since all of the legal elements of a cause of action for negligence were apparent except that of duty,[46] the proper inquiry was whether it would be consistent with public policy and notions of fairness to impose upon a social host a duty to refuse an intoxicated guest further access to alcoholic beverages.[47] The court pointed out that death and injury caused by drunken driving had reached dangerous levels,[48] that New Jersey had criminal penalties for persons driving under the influence of alcohol,[49] and that licensees were prohibited from serving alcohol to intoxicated adults,[50] and concluded that imposition of this duty was both fair and in accord with public policy.[51] The court further noted that since the legislature had not nullified the court's imposition of liability on licensees and social hosts who served alcohol to minors,[52] and since negligence law has traditionally been the province of the judiciary,[53] then, despite the absence of a dram shop act, the issue was a proper one for judicial determination and was consonant with enacted legislative policy.[54] In con-

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service by a social host, no logical distinction existed between service to minors and service to adults. *Figuly*, 449 A.2d at 564-65.

[46] *Kelly*, 476 A.2d at 1222. The court listed these elements of negligence as "an action by defendant creating an unreasonable risk of harm to plaintiff, . . . that was clearly foreseeable, and . . . that resulted in an injury equally foreseeable." *Id.* The court determined that it could be concluded that the Zaks should have foreseen the unreasonable risk in continuing to serve Gwinnell alcohol beyond the point at which he was obviously intoxicated. *Id.* at 1221-22.

[47] *Id.* at 1222 (citing Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 989 (1928) (existence of duty dependent upon public policy and foreseeability of injury)).

[48] *Kelly*, 476 A.2d at 1222 n.3. From 1978 to 1982, 47.5% of all traffic fatalities and 20.5% of all traffic injuries in New Jersey were related to alcohol consumption. *Id.; see also supra* note 40.

[49] *Kelly*, 476 A.2d at 1222; *see supra* note 5.

[50] *Kelly*, 476 A.2d at 1222; *see supra* notes 27-29 and accompanying text.

[51] *Kelly*, 476 A.2d at 1222. The court considered the imposition of a duty in this case was a logical progression from *Rappaport, Soronen* and *Linn. Id.* at 1222-23. The court disagreed with the dissent's conclusion that the Oregon Legislature had abrogated the holding in *Wiener. Id.* at 1221 n.2. It determined that the Oregon Legislature had merely limited the cause of action to cases in which a host served alcohol to a visibly intoxicated guest. *Id.; see also* note 35.

[52] *Kelly*, 476 A.2d at 1226. Indeed the court considered passage of S. 2312, 201st Leg. (1984) (amending N.J. STAT. ANN. § 33-1-7 (West Supp. 1984)), to be legislative approval of its decision. *Kelly*, 476 A.2d at 1226. The amendment states that "[a]nyone who purposely or knowingly offers or serves an alcoholic beverage to a person under the legal age for consuming alcoholic beverages or entices or permits that person to drink an alcoholic beverage is a disorderly person." S. 2312, 201st Leg. (1984).

[53] *Kelly*, 476 A.2d at 1226.

[54] *Id.* The court was not hindered by its inability to accurately measure the impact of its decision on the average citizen. *See id.* at 1227-28. Moreover, the court pointed out

clusion, the court held that because of the far-reaching implications of its decision,[55] liability would ensue only where the host knew the guest intended to drive, the guest was visibly intoxicated, the host served alcohol directly to the guest, and the intoxication was the cause of the guest's negligence.[56]

In dissent, Justice Garibaldi[57] noted that the legislature had the resources to conduct a thorough investigation of the effects of imposing liability on social hosts for the actions of adult guests[58] and that presently the New Jersey Legislature only prohibited serving alcohol in a social setting when the individual was a minor.[59] He further noted that no state legislature had allowed such an expansion of liability to go unaltered[60] and concluded that such a change was properly left to the legislature.[61] Justice Garibaldi argued that since the typical social host lacked the expertise to judge a person's sobriety, or lack thereof,[62] and since social pressures tended to discourage restraining a guest's alcohol

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that given the societal costs of drunken driving, any burden borne by the social host, including liability in excess of insurance coverage and increased insurance costs, was not disproportionate to the fault of the host. *Id.* at 1225, 1229. If the legislature disagreed, it clearly could act to remedy any problem. *Id.* at 1227.

[55] *Id.* at 1230.

[56] *Id.* The court held that the host and guest were joint tortfeasors and remanded for a determination of any right to contribution or indemnification. *Id.* at 1223 n.8.

In February of 1985, *Kelly v. Gwinnell* went back to trial. Before any testimony could be heard, however, the case was settled for $172,500, $100,000 being paid by Gwinnell's insurance company and $72,500 being paid by the Zaks. *Expensive Pour,* TIME, Mar. 4, 1985, at 73.

Prior to the decision in *Kelly,* Assembly Bill 43 was introduced to the New Jersey Law of Public Safety and Defense Committee. The bill, if enacted by the New Jersey Legislature, would exempt social hosts from liability for serving adult guests and effectively overrule *Kelly. See* A. 43, 201st Leg. (1984).

[57] *Kelly,* 476 A.2d at 1230 (Garibaldi, J., dissenting). The court split with six voting to reverse and remand and one voting to affirm. *Id.* at 1236.

[58] *Id.* at 1233.

[59] *Id.* at 1235; *see supra* note 52.

[60] *Id.* at 1231. Justice Garibaldi referred to California and Oregon. *See id.; supra* note 35 and text accompanying note 41.

[61] *Id.* at 1235. Justice Garibaldi reasoned that the legislature could fashion a more equitable remedy by requiring contribution from the drunken driver or making the host secondarily liable to the injured party. He distinguished this case from those involving the sale of liquor by a licensee or sale of liquor to a minor. In such cases, a standard of care was implicit in the legislative enactment; however, New Jersey had no statute providing a penalty for social purveyance of alcohol to a visibly intoxicated adult guest. *Id.*

[62] *Id.* at 1233. He also noted that while the majority called for a subjective determination of the guest's intoxication, it applied an objective standard — Gwinnell's blood test. *Id.; see supra* note 5. The host, however, was required to make a decision on a condition affected by many variables. *Id.* at 1233-34.

consumption,[63] acceptance of the majority opinion would place an excessive burden on the average citizen.[64] He concluded that, unlike the commercial vendor, the social entertainer is unable to spread the cost of liability; thus, the economic cost to the individual would be disproportionate to his culpability.[65]

The court in this instance offers a timely and well-intended extension of the law of negligence; however, in so doing it has saddled the typical social host with an undue burden. Admittedly, many arguments support the court's decision. Given the amount of damage caused by drunken drivers,[66] imposition of a duty on social hosts can be justified as a deterrent.[67] Likewise, the dissent's contention that societal pressures will hamper this deterrence is legally unconvincing[68] and of little consolation to an innocent injured party. While it is true that the immediate cause of the injury is the negligence of the inebriate, arguably the duty of the host is easily effectuated: his only duty is to discontinue service of alcohol to visibly intoxicated guests.[69]

Furthermore, the New Jersey Supreme Court has not over-stepped its judicial authority by deciding an issue which arguably falls within the province of the legislature.[70] Judicial abrogation of a common law immunity is not without precedent.[71] Nor is the legislature precluded from addressing this issue in the future.[72] It is interesting to note that at the time *Kelly* was decided, a bill was before the New Jersey State Assembly which would bar all claims against social hosts for injuries caused by the supply of liquor to adult guests.[73] This bill presently

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[63] *Id.* at 1234.

[64] *Id.* at 1234-35. Justice Garibaldi was not convinced that homeowner's insurance would cover this type of liability. *Id.* at 1235. In any event, policy premiums were sure to rise. Justice Garibaldi also noted that New Jersey maintained an Unsatisfied Claim and Judgment Fund from which an injured plaintiff could recover damages inflicted by an insolvent motorist. *Id.* Thus, this cause of action was not needed to further compensate the injured party. *Id.* at 1232-33.

[65] *Id.* at 1235.

[66] *See supra* note 40.

[67] *See supra* notes 48-51 and accompanying text.

[68] *See supra* note 21. The defendant should not be allowed to escape liability merely because his conduct is no worse than his neighbors. *Id.*

[69] *See supra* note 56 and accompanying text.

[70] *See supra* notes 52-54 and accompanying text. Indeed, contrary to Justice Garibaldi's dissent, *see supra* note 58 and accompanying text, further legislative study would duplicate the efforts of the President's Commission on Drunk Driving; *see supra* note 40.

[71] *See supra* note 44 and accompanying text.

[72] *See supra* notes 52-54 and accompanying text.

[73] *See* A. 43, 201st. Leg. (1984). Apparently, this bill is a reaction to Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564 (Law Div. 1982). *See supra* note 45.

remains before the New Jersey Law of Public Safety and Defense Committee.[74]

Nevertheless, despite these arguments supporting the court's decision, the rule announced in *Kelly* simply goes too far. The sphere of liability must end somewhere. As New York Supreme Court Justice Andrews said: "We draw an uncertain and wavering line but we draw it the best we can."[75] Here, the court's pen has strayed beyond the bounds of fairness and justice. Although this argument may appear simplistic, it is grounded in the realities of the legal system. In states such as New Jersey which do not allow apportionment of damages among co-defendants or in states such as Mississippi which do not allow third-party practice, acceptance of *Kelly* could result in the social host bearing liability unjustly disproportionate to his fault.[76] Furthermore, as a practical matter, by conditioning liability on *visible* intoxication, the court may have emasculated any deterrent effect that imposition of liability on the social host would have on alcohol related traffic accidents. Once the imbiber becomes visibly intoxicated, he is at once incompetent to operate an automobile. Thus, a subsequent collision may occur despite the host's failure to refuse the guest further alcohol.[77]

Finally, the fact that it is within a court's judicial authority to decide an issue cannot be regarded as an argument for imposing a duty. Thus, the primary remaining argument in favor of the decision in *Kelly* is the possible effect it may have on the number of alcohol related traffic accidents. Given the uncertainty that *Kelly* will have this effect and the very real burden it imposes on the social host, *Kelly*

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[74] Telephone interview with librarian of the New Jersey state law library (April 16, 1985).

[75] Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99, 104 (1928)(Andrews, J., dissenting).

[76] *See supra* note 29. If the host is unable to implead the drunken driver, he could be solely liable for the plaintiff's injuries. Conversely, if he is allowed to bring a third party action against the driver, and the jury is allowed to apportion damages between the co-defendants according to fault, a more just result could be reached. *Id.* In such event, only in the most egregious cases would the host bear the greater share of liability.

[77] This is not to ignore the argument that continued service of alcohol to an already visibly intoxicated guest increases the risk of injury. It is at this point the New Jersey court concluded the injury became legally foreseeable. *See supra* note 22 and accompanying text. However, in light of the questionable deterrent effect of this rule and the burden placed on the social host to be responsible for his guests' conduct, the sphere of liability should not have been extended to include the social host of an adult guest.

should not, and probably will not, bear progeny in other jurisdictions.*

George H. Ritter

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* After this note was written, the Mississippi Supreme Court addressed the issue of social host liability in Boutwell v. Sullivan, 469 So. 2d 526 (Miss. 1985). In *Boutwell,* the plaintiffs brought a wrongful death action against a social host who allegedly continued to serve beer to a visibly intoxicated adult guest. *Id.* at 527. Driving home, the guest collided with plaintiffs' decedent causing his death. *Id.* Affirming dismissal in favor of the host, the court first found that there was no statutory prohibition against social distribution of beer to a visibly intoxicated adult. *Id.* at 528. According to the court, MISS. CODE ANN. § 67-1-83(1) (Supp. 1984), which prohibits "permittee[s] or other person[s]" from serving "any alcoholic beverage to any person . . . who is visibly intoxicated," was not applicable since "other persons" refers to employees or persons acting under the direction of a permittee, and since the statutory definition of "alcoholic beverage" does not include beer containing not more than four percent alcohol. *Boutwell,* 469 So. 2d at 528; *see* MISS. CODE ANN. § 67-1-5(a) (Supp. 1984) (definition of "alcoholic beverage"). Nor was § 67-3-53(b), which prohibits permittees from selling beer or wine to " visibly or noticeably intoxicated" persons, applicable since the appellee was not a permittee. *Boutwell,* 469 So. 2d at 528. The court also refused to apply *Kelly v. Gwinnell* and held that the defendant social host was not liable to the plaintiff for the negligence of his intoxicated guest. *Boutwell,* 469 So. 2d at 529. However, the court refused to say that under no circumstances would a social host be liable to an injured third-party, concluding that the issue was better addressed by the state legislature. *Id.* at 529.

The *Boutwell* court's rejection of *Kelly* appears well founded; however, its treatment or § 67-1-83 arguably leaves room for an action to be maintained against a social distributor of hard liquor. *See Boutwell,* 469 So. 2d at 527-28. The court only briefly addressed to whom the words "other person" refer in § 67-1-83(1): "The above section relates to, and covers, a permittee or other person (ordinarily employee) who is not a permittee but is under the control and direction of the permittee." *Boutwell,* 469 So. 2d at 528. Although not cited by the court, MISS. CODE ANN. § 67-1-5(e) (Supp. 1984) defines "person" as "*any individual,* partnership, corporation, association or other legal entity *whatsoever.*" *Id.* (emphasis added). Thus, a zealous advocate could argue that the *Boutwell* court's treatment of the words "other person" was erroneous dictum. However, such an argument would belie the general purpose of the act, which is to legalize and regulate the manufacture and sale of alcoholic beverages. *See* MISS. CODE ANN. § 67-1-7 (Supp. 1984). Any construction inconsistent with the one proffered in *Boutwell* would defeat the obvious legislative intent of the act.

Federal Preemption—Arbitration—Federal Arbitration Act Creates National Substantive Law Applicable in Federal and State Courts and Supercedes Contrary State Statutes

Appellee filed a class action[1] against appellant[2] in the Superior Court of California for various claims relating to franchise agreements.[3] Pursuant to an arbitration provision in the agreements, appellant petitioned to compel arbitration.[4] The trial court granted appellant's motion, but excluded from arbitration claims based on the California Franchise Investment Law.[5] The California Court of Appeals reversed the trial court's decision as to the statutory claims, holding that section 31512 of the Franchise Investment Law did not invalidate agreements to arbitrate claims brought under the statute.[6] The appellate court

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[1] Appellee Richard D. Keating filed a class action, asserting that the class included some 800 California 7-Eleven convenience store franchisees. A number of franchisees had previously filed individual actions presenting substantially the same claims as the class action. The cases were consolidated. Southland Corp. v. Keating, 104 S. Ct. 852, 855 (1984).

[2] Appellant, Southland Corporation, is owner and franchisor of 7-Eleven convenience stores. 104 S. Ct. at 855.

[3] *Id.* Appellee alleged, among other things, fraud, oral misrepresentation, breach of contract, breach of fiduciary duty and violation of disclosure requirements of the California Franchise Investment Law. *Id.*

[4] *Id.* The arbitration provision in the franchise agreement provided: "Any controversy or claim arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof." *Id.* Black's Law Dictionary defines arbitration as the "reference of a dispute to an impartial (third) person chosen by the parties who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard." Black's Law Dictionary 96 (5th ed. 1979).

[5] *See* Keating v. Superior Court, 31 Cal. 3d 584, 592, 645 P.2d 1192, 1196, 183 Cal. Rptr. 360, 364 (1982).

The Franchise Investment Law, codified at Cal. Corp. Code §§ 31000-31516 (West 1977 & Supp. 1984), regulates offers and sales of franchises and includes registration and disclosure requirements. *See* Cal. Corp. Code §§ 31110-31124 (West 1977)(requiring registration of franchise offers and specifying information that must be disclosed).

The trial court, in excluding the statutory claims from its order compelling arbitration, apparently determined that the contractual provisions for arbitration were too narrow to include plaintiffs' statutory claims and that the California legislature had not intended for claims brought under the state's Franchise Investment Law to be subject to arbitration. *See* Keating v. Superior Court, 109 Cal. App. 3d 784, 167 Cal. Rptr. 481, 492 (Cal. Ct. App. 1980).

[6] Keating v. Superior Court, 109 Cal. App. 3d 784, 167 Cal. Rptr. 481, 493-95 (Cal.

stated further that if section 31512 were held to preclude arbitration, such an interpretation would conflict with section 2 of the Federal Arbitration Act[7] and thus violate the Supremacy Clause.[8] The California Supreme Court reversed the intermediate appellate court, concluding that section 31512 invalidated contract provisions for arbitration of future claims brought under the Franchise Investment Law,[9] and that section 2 of the Federal Arbitration Act did not preempt the state statute.[10] On appeal, the United States Supreme Court, *held*, reversed in

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Ct. App. 1980). Section 31512 of the Franchise Investment Law states: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." CAL. CORP. CODE § 31512 (West 1977). The trial court had apparently looked to this section in determining that the California legislature had not intended that claims brought under the Franchise Investment Law be subject to arbitration. *See* Keating v. Superior Court, 31 Cal. 3d 584, 596, 645 P.2d 1192, 1198, 183 Cal. Rptr. 360, 366 (1982).

[7] 109 Cal. App. 3d 784, 167 Cal. Rptr., 481, 494 (Cal. Ct. App. 1980). Section 2 of the Federal Arbitration Act provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1982).

[8] Keating v. Superior Court, 109 Cal. App. 3d 784, 167 Cal. Rptr. 481, 494-95 (Cal. Ct. App. 1980). The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

[9] Keating v. Superior Court, 31 Cal. 3d 584, 596-99, 645 P.2d 1192, 1198-1200, 183 Cal. Rptr. 360, 366-68 (1982). The court found that since the California legislature had modeled the state's Franchise Investment Act after the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1981), then it must have intended the law to be interpreted in accordance with federal court decisions under the Securities Act of 1933. *See* 31 Cal. 3d at 596-99, 645 P.2d at 1198-1200, 183 Cal. Rptr. at 366-68. In Wilko v. Swan, 346 U.S. 427 (1953), the United States Supreme Court held that controversies arising under the Securities Act are not subject to prior arbitration agreements. *Id.* at 438. The California Supreme Court determined that the state's legislature intended the *Swan* doctrine to apply to claims under the Franchise Investment Law, making prior agreements to arbitrate nonbinding for such claims. *See* 31 Cal. 3d at 596-99, 645 P.2d at 1198-1200, 183 Cal. Rptr. at 366-68.

[10] Keating v. Superior Court, 31 Cal. 3d, 584, 602-04, 645 P.2d 1192, 1202-04, 183 Cal. Rptr. 360, 370-72 (1982). Noting that Congress had left regulation of franchise matters to the states and that the California regulatory scheme was compatible with the regulatory policy of the federal securities laws, the court determined that principles of federal substantive law embodied in the Federal Arbitration Act were not "so unyielding

part, dismissed in part, and remanded. The Federal Arbitration Act, established through Congress' commerce clause power, creates national substantive law applicable in both state and federal courts and preempts state statutes that would limit enforcement of arbitration agreements. *Southland Corp. v. Keating*, 104 S. Ct. 852 (1984).

Agreements to submit disputes to a neutral private party for resolution are by no means a modern development,[11] but American law was slow to afford them the critical attribute of enforceability. Until the advent of statutory arbitration provisons following the First World War,[12] American courts generally held to the view that an agreement to submit to arbitration was unilaterally revocable so long as the arbitrator had not made an award.[13] Early in this century, a few states overturned the common law revocability doctrine by statute,[14] and in 1924,

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as to require enforcement of an agreement to arbitrate a dispute over the application of a regulatory statute which a state legislature, in conformity with analogous federal policy, has decided should be left to judicial enforcement." *See id.*, 645 P.2d at 1203-04, 31 Cal. Rptr. at 371-72.

[11] One commentator traced the practice to ancient Roman law and suggested that it came to our common law through the English ecclesiastical courts. *See* Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597-98 (1928). Lord Coke's report of Vynior's Case, 77 Eng. Rep. 595 (K.B. 1609), suggests that the concept was far from novel in England almost 400 years ago. *See also* 16 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1918A (3d ed. 1976)(asserting that arbitration was used in ancient Egypt and ancient Greece).

[12] *See, e.g.*, N.Y. Laws of 1920, ch. 275 (present version codified at N.Y. CIV. PRAC. LAW §§ 7501-14 (McKinney 1980 & Supp. 1984)).

[13] *See* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120-22 (1924)(setting out general rule). This rule is usually traced to Vynior's Case, 77 Eng. Rep. 595 (K.B. 1609), though there are earlier English decisions employing the doctrine. *See* Sayre, *supra* note 11, at 602 & n.25 (discussing cases cited in Coke's report of *Vynior's Case*). As Professor Sayre pointed out, *Vynoir's Case* rested on old principles relating to delegation of powers, and it was not until almost a century and a half later that the modern rationale for the doctrine of revocability first appeared. *See id.* at 597-612 (tracing the history of the doctrine of revocability). In 1746, the King's Bench refused to enforce a contract to submit future disputes to arbitration, reasoning that such a contract was an agreement to "oust" the courts of their jurisdiction over civil disputes. Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746). This became a primary rationale for the revocability doctrine in American law. *See, e.g.*, Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874)(agreements in advance to deprive courts of their jurisdiction are illegal and void); Mitchell v. Dougherty, 90 F. 639, 645 (3d Cir. 1898)(arbitration may not oust jurisdiction of the courts); Meacham v. Jamestown, F. & C. R.R. 211 N.Y. 346, 105 N.E. 653, 656 (1914)(Cardozo, J., concurring)(jurisdiction established by law and will not be diminished by contract); 16 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1923, at 555 (3d ed. 1976). For a discussion of judicial hostility towards arbitration, see Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 239-43 (1929).

[14] *See supra* note 12. Business groups favored making arbitration agreements en-

Congress followed their lead and enacted the Federal Arbitration Act[15] to abrogate the common law rules.[16]

The Federal Arbitration Act upholds the validity and enforceability of written arbitration agreements in maritime transactions and in contracts involving interstate commerce, "save upon such grounds as exist at law or in equity for the revocation of any contract."[17] The Act also provides for stay of judicial proceedings in federal court when a dispute is covered by an arbitration agreement[18] and gives federal

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forceable and appealed to Congress and state legislatures through national, state, and local Chambers of Commerce. *See* Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U.L. REV. 238, 247-48 (1930). Business leaders saw arbitration of commercial disputes as an efficient alternative to the often expensive and time-consuming judicial processes for dispute resolution. Also, businessmen distrusted the courts because they believed that the courts failed to consider common business principles when making decisions. Note, *Contracts—Effect of the United States Arbitration Act*, 25 GEO. L.J. 443, 445-46 (1937).

By the mid-1920's, all states except Oklahoma and South Dakota statutorily provided for some form of arbitration. These statutes, however, only codified the common law rules of non-enforceability. In an attempt to remedy the defects in the arbitration process in New York, the New York legislature enacted the New York Arbitration Law of 1920. The New York law was the first state statute to provide that an agreement to arbitrate future disputes between contracting parties was enforceable and irrevocable. The New York Act became the model for modern state arbitration acts. *Id.* at 444-46.

[15] 9 U.S.C. §§ 1-14 (1982)(originally enacted as Act of Feb. 23, 1925, ch. 213, §§ 1-15, 43 Stat. 883, amended as Act of July 30, 1947, ch. 392, § 1, 61 Stat. 669). Congress patterned the Act after the New York statute. S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924).

[16] *See* S. REP., *supra* note 15, at 1; *see also* Note, *The Consequences of a Broad Arbitration Clause Under the Federal Arbitration Act*, 52 B.U.L. REV. 571, 576 (1972). Sections 2, 3, and 4 of the Act were Congress' attempt to abolish the common law doctrine of revocability and unenforceability of arbitration agreements. *Id.* at 573-76; *see supra* note 7 and *infra* notes 18 & 19 (text of these provisions); *see also* Standard Magnesium Corp. v. Fuchs, 251 F.2d 455, 457 (10th Cir. 1957)(Congress intended Act to abrogate common law rule of revocability and to place arbitration agreements on same footing as other contracts); Kulukundis Shipping Co. v. Antorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)(purpose of Act was to deliberately alter previously existing judicial atmosphere).

[17] 9 U.S.C. § 2 (1982). For the text of this provision, see *supra* note 7.

[18] 9 U.S.C. § 3 (1982). Section 3 of the Act provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

courts authority to compel arbitration if the validity of the arbitration clause itself is not in issue.[19]

Established judicial views regarding the nature of arbitration[20] and Congress' concept of the Federal Arbitration Act at its enactment[21] contributed to early characterization of the Act as a procedural measure.[22] This interpretation became significant because of the indirect effect of *Erie Railroad v. Tompkins*.[23] *Erie*, of course, required federal courts hearing diversity actions to apply the substantive laws of the forum state.[24] The decision in *Guaranty Trust Co. v. York*[25] appeared to make the Act inapplicable in many diversity cases. *Guaranty Trust Co.* held that for purposes of the *Erie* analysis, a particular federal procedural rule should be considered to be substantive—and therefore not applicable in a diversity case—if applying it would substantially affect the outcome of the action.[26] Since the common law revocability doctrine still prevailed in most states, application of the Federal Arbitration Act would have had a "substantial" effect on the outcome of a

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9 U.S.C. § 3 (1982).

[19] 9 U.S.C. § 4 (1982). Section 4 of the Act provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, . . . would have jurisdiction . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (1982).

[20] *See* Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 128 (1864)(court's referral of case to referee upon agreement of parties relates "to the mode of trial," and federal courts have authority to establish necessary rules for orderly conduct of business); Meacham v. Jamestown, F. & C. R.R., 211 N.Y. 346, 105 N.E. 653, 655 (1914)(Cardozo, J., concurring)(arbitration relates to law of remedies and is governed by law of forum).

[21] *See* H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)(enforceability of arbitration agreement is question of procedure to be determined by law of forum); *see also* S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924)(reference to Supreme Court decision which interpreted New York Arbitration Act as remedial in nature).

[22] *See* Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 276 (1926). Commentators stated that Congress enacted the law pursuant to Article III, section 1, of the Constitution, the powers granted to Congress to regulate the federal courts, since the Act established a procedure for the enforcement of arbitration agreements in the federal courts. *See id.* at 274-78; *see also* Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 279 (1932)(Act provided remedy to fit agreement).

[23] 304 U.S. 64 (1938).

[24] *Id.* at 78.

[25] 326 U.S. 99 (1945).

[26] *Id.* at 109.

diversity action in which the substantive law of one of those states was to be applied. The *Erie-Guaranty Trust* doctrine, therefore, apparently prevented application of the Act in diversity actions.[27]

Bernhardt v. Polygraphic Co. of America[28] presented to the Supreme Court an opportunity to resolve this constitutional dilemma. *Bernhardt* was an action for breach of an employment contract brought in state court and removed on the jurisdictional basis of diversity of citizenship.[29] The district court denied defendant's application for a stay to allow for arbitration under the contract, holding that *Erie* required it to apply the state-law revocability doctrine.[30] The Second Circuit Court of Appeals reversed and ordered a stay under section 3 of the Act.[31] The Supreme Court disagreed, holding that since the contract represented neither a maritime transaction nor a transaction involving commerce, the Federal Arbitration Act did not apply.[32] In this diversity case, then, *Guaranty Trust* mandated that federal courts not enforce the contract's arbitration provision if the outcome would be

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[27] Note, *Federal Arbitration Act and Application of the "Separability Doctrine" in Federal Courts*, 1968 DUKE L.J. 588, 595-96.

[28] 350 U.S. 198 (1956).

[29] *Id.* at 199. The Federal Arbitration Act did not create an independent basis for federal jurisdiction. Diversity of citizenship with the requisite jurisdictional amount or the plaintiff's allegation of another claim arising under federal law is necessary to a federal court's jurisdiction over a case in which the Act is invoked. *See, e.g.*, Allison Inc. v. Minikin Storage, 452 F. Supp. 573, 574 (D. Neb. 1978)(Act did not grant jurisdiction over and above other bases of jurisdiction); Litton RSC v. Pennsylvania Turnpike Comm'n, 376 F. Supp. 579, 585 (E.D. Pa. 1974)(Act did not provide independent source of federal jurisdiction), *aff'd*, 511 F.2d 1394 (3d Cir. 1975).

[30] 350 U.S. at 199-200.

[31] Bernhardt v. Polygraphic Co., 218 F.2d 948, 951 (2d Cir. 1955). The court held that § 3 of the Federal Arbitration Act, which provides for a federal court to stay its proceedings pending arbitration, covered all arbitration agreements, not being limited like § 2 to maritime transactions and transactions involving interstate commerce. *Id.* at 951; *see* Donahue v. Susquehanna Collieries Co., 138 F.2d 3, 4-6 (3d Cir. 1943)(applied § 3 stay provision to intrastate contract). *But see In re* Cold Metal Process Co., 9 F. Supp. 992, 993 (W.D. Pa. 1935)(limited § 3 and § 4 to contracts specified in § 2).

[32] 350 U.S. at 200-02. The Court stated that §§ 1, 2, and 3 of the Federal Arbitration Act were "integral parts of the whole," and, therefore, the Act covered only those contracts involving maritime transactions or affecting interstate commerce. *Id.* at 201; *see also* Medical Dev. Corp. v. Industrial Molding Corp., 479 F.2d 345, 347 (10th Cir. 1973)(Act applicable because contracts evidenced transactions in interstate commerce); Varley v. Tarrytown Assoc., 477 F.2d 208, 209 (2d Cir. 1973)(contract must involve interstate or foreign commerce for Act to apply); McDonough Const. Co. v. Hanner, 232 F. Supp. 887, 890 (M.D.N.C. 1964)(Act limited to maritime transactions and transactions involving interstate or foreign commerce).

different under the applicable state law.[33] The Court declined to decide whether state law or the Act controlled diversity cases that involved arbitration clauses in contracts affecting interstate commerce,[34] but Justice Frankfurter in concurrence asserted that the majority's avoidance of this question compelled him to conclude that the Act did not apply in diversity cases.[35]

In *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*,[36] the United States Court of Appeals for the Second Circuit framed an answer to the question not addressed by the Supreme Court in *Bernhardt*. In this diversity action, the plaintiff claimed to have been fraudulently induced to enter an interstate sales contract. The lower court denied defendant's motion for a section 3 stay of the proceedings pending arbitration under the terms of the contract.[37] The district court decision apparently agreed with state law,[38] but the Second Circuit reversed. The Act's provision making arbitration agreements enforceable was "national substantive law," the court declared, to be applied by federal courts regardless of the basis of subject matter jurisdiction.[39] In adopting the Act, Congress relied on its constitutional powers over commerce and maritime matters and intended to exercise those powers fully to make the Act as widely applicable as possible.[40] Thus, for agreements within the Act's scope, no *Erie* issue was presented; federal law con-

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[33] 350 U.S. at 202-05.

[34] *Id.* at 202.

[35] *Id.* at 208 (Frankfurter, J., concurring). *See also* Lummas Co. v. Commonwealth Oil Refining Co., 280 F.2d 915, 924 (1st Cir. 1960)(state law governed arbitration agreement), *cert. denied*, 364 U.S. 911 (1960); Rose v. Twentieth Century-Fox Film Corp., 236 F.2d 632, 634 (9th Cir. 1956)(analysis that state law controlled, relying on *Bernhardt*).

[36] 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960).

[37] 271 F.2d at 404. Plaintiff, Robert Lawrence Co., a Massachusetts corporation, alleged that defendant, Devonshire Fabrics, a New York corporation, fraudulently induced it to purchase and pay for merchandise that did not conform to the quality stipulation in the contract. *Id.* Though the contract contained an arbitration clause, the district court refused to stay the litigation, holding that there had to be a judicial determination that the contract was not fraudulent in its inception before the arbitration clause it contained could be enforced. *See id.*

[38] *See* 271 F.2d at 412. New York law apparently would have supplied the rule of decision were state law controlling, and the court of appeals noted that *In re* Wrap-Vertiser Corp. (Plotnick), 3 N.Y.2d 17, 163 N.Y.S.2d 639, 640-41, 143 N.E.2d 366, 367 (1957), had held that an arbitration agreement did not cover a claim of fraud in the inducement. 271 F.2d at 412.

[39] 271 F.2d at 409.

[40] *Id.* at 406.

trolled.[41] The court found that under federal law, an arbitration clause was separable from the contract containing it[42] and that by itself, an allegation of fraud in the inducement of the principal contract would not suspend enforceability of the arbitration agreement.[43]

Eight years later, the United States Supreme Court ratified the *Robert Lawrence* conclusion in *Prima Paint Corp. v. Flood & Conklin Manufacturing*,[44] which presented a factual situation similar to that the Second Circuit had encountered in *Robert Lawrence*.[45] In *Prima Paint*, a diversity case, the district court granted defendant's motion for a section 3 stay of plaintiff's suit for rescission based on alleged fraud in the inducement of the contract.[46] In affirming the stay, the Supreme Court interpreted the Federal Arbitration Act instead of looking to state law.[47] In holding that federal law governed, the Court

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[41] *Id.* at 404-06, 409.

[42] *Id.* at 409-10. Subsequently, the same court held that its doctrine of separability would not require arbitration of a void contract which was conditioned upon the occurrence of conditions precedent that were never satisfied. El Hoss Eng'g & Transp. Co. v. American Indep. Oil Co., 289 F.2d 346, 351 (2d Cir. 1961), *cert. denied*, 368 U.S. 831 (1961); *see also* Mosley v. Electronic & Missile Facilities, Inc., 374 U.S. 167, 170 (1963)(plaintiff must specifically allege that arbitration clause was itself fraudulently procured before arbitration proceeding will be stayed pending a judicial determination of fraud).

[43] 271 F.2d at 410-11. State law apparently would have required the court first to determine whether the contract was fraudulently induced. The validity of the arbitration agreement thus depended upon the validity of the container contract. *Id.* at 404.

[44] 388 U.S. 395 (1967).

[45] *See id.* at 397-99. Prima Paint had purchased Flood & Conklin's paint business and entered a "consulting agreement" with the company. Almost immediately, Flood & Conklin filed a petition in bankruptcy. Prima Paint then delayed direct payment of sums due under the consulting contract, claiming that Flood & Conklin had fraudulently misrepresented its solvency at the time the contract was executed. Flood & Conklin then invoked an arbitration provision in the contract. Prima Paint responded by filing suit for rescission, and Flood & Conklin asked for a § 3 stay to allow arbitration. Jurisdiction was based on diversity. *Id.*

[46] *Id.* at 399. The district court relied on the *Robert Lawrence* holding. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 262 F. Supp. 605, 607 (S.D.N.Y. 1966).

[47] *See* 388 U.S. at 402-04. The Court noted disagreement among the courts of appeals about whether the severability of an arbitration clause was a question of state law or of federal law. *Id.* at 402-03. *Compare* Lummus Co. v. Commonwealth Oil Refining Co., 280 F.2d 915, 923-24 (1st Cir.), *cert. denied*, 364 U.S. 911 (1960), *with* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 409-10 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960)(arbitration clause severable as a matter of federal law). The Supreme Court held that Congress had settled the severability question for contracts within the scope of the Federal Arbitration Act. Reading § 3 and § 4 of the Act together, the Court found that Congress intended federal courts to consider only claims relating to the arbitration clause—and not allegations of fraud in the induce-

treated the *Erie-Guaranty Trust* doctrine as irrelevant.[48] The pertinent issue was whether Congress had the authority to enact the Federal Arbitration Act. The Court held that the Act was a legitimate exercise of Congress' federal commerce power; federal courts were therefore bound to apply the Act in diversity cases.[49]

With this issue settled in *Prima Paint*, the Court next considered the scope of the Act's applicability in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[50] After suit was filed against Mercury in state court seeking, among other things, a declaration that there was no right to arbitration, Mercury instituted a diversity action in federal court requesting an order to compel arbitration pursuant to section 4 of the Federal Arbitration Act. On the hospital's motion, the district court stayed its proceedings pending resolution of the state suit involving identical issues.[51] The court of appeals reversed the district court and issued instructions to compel arbitration.[52] Affirming the order of the appellate court, the Supreme Court focused its analysis on a broader issue,[53] but also enunciated an expansive view of the Federal Arbitration Act. Section 2 created federal substantive law applicable to

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ment of the contract as a whole—in determining whether to grant a § 3 stay. *See* 388 U.S. at 403-04.

[48] *Id.* at 404-05.

[49] *See* 388 U.S. at 404-06. For discussion of the scope of the *Prima Paint* holding, see *infra* note 50.

[50] 460 U.S. 1 (1983).

In his opinion for the Court in *Moses H. Cone*, Justice Brennan stated that although *Prima Paint* extended only to the specific issue before the Court, whether a claim of fraud in the inducement was an arbitrable controversy (stated differently, whether a federal court should refuse to stay judicial proceedings to allow for arbitration when the judicial proceeding involved a claim of fraud in the inducement), the courts of appeals had interpreted *Prima Paint* as establishing a federal policy favoring arbitration. This was the correct view, Justice Brennan said, and as a matter of federal law, any doubts should be resolved in favor of arbitration. 460 U.S. at 24-25; *see, e.g.*, Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 643 (7th Cir. 1981)(duty to arbitrate not avoidable on basis of need for judicial resolution of nonarbitrable claim); Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979)(stay pending arbitration should be granted unless arbitration clause clearly fails to cover dispute); Germany v. River Terminal Ry., 477 F.2d 546, 547 (6th Cir. 1973)(waiver of arbitration agreement not inferred from party's failure to rely on arbitration provision).

[51] 460 U.S. at 7.

[52] Mercury Constr. Co. v. Moses H. Cone Memorial Hosp., 656 F.2d 933 (4th Cir. 1981).

[53] *See* 460 U.S. at 13-28. The Court took *Moses H. Cone* as an opportunity to examine the circumstances under which a federal trial court should stay its proceedings in deference to parallel state court proceedings. *Id.* The case has been widely cited on this point.

any arbitration agreement coming within the scope of the Act. The Court said the section was "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[54] Further, state as well as federal courts must apply the substantive law created by the Act, and "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbirtration . . . ."[55]

In the instant case, the Court reasoned that since Congress' authority to create substantive law under the commerce clause was the basis for its promulgation of the Federal Arbitration Act,[56] then the substantive law created by the Act is applicable in both state and federal courts.[57] Since the purpose of the Act was to override the common law's hostility toward arbitration[58] and to prevent state legislatures from impeding the enforceability of arbitration agreements,[59] then limiting the application of the Act to federal courts would frustrate Congress' intent.[60] In addition, since Congress placed the "involving commerce" requirement in section 2 of the Act, then Congress must have intended the statute to apply in both state and federal courts rather than being merely a procedural remedy.[61] Furthermore, since most civil litigation in the United States occurs in state courts,[62] Congress did not intend to limit the reach of the Federal Arbitration Act to claims

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[54] 460 U.S. at 24. The Supreme Court concluded that the stay of the federal court action frustrated the statutory policy of swift and unimpeded enforcement of arbitration agreements. Both of the Act's sections for enforcing arbitration agreements—the stay pursuant to § 3 and the § 4 order compelling arbitration—provided summary hearings for an expeditious treatment of the matter. 460 U.S. at 22-23.

[55] 460 U.S. at 24-25.

One commentator, writing before *Moses H. Cone*, noted that when state courts apply the Federal Arbitration Act in state actions, a "reverse-*Erie*" situation occurs. State court application of federal law would enforce the *Erie* policy of discouraging forum shopping and achieve a uniform result. George, *The Federal Arbitration Act in State Courts: Converse Erie Problems*, 55 CORNELL L. REV. 623, 625 (1970).

[56] 104 S. Ct. at 858.

[57] *Id.* at 859. The Court stated that Congress generally creates rules applicable in both state and federal courts when it invokes the commerce clause power to enact substantive federal laws. *Id.*

[58] *Id.* at 860; *see supra* note 16 and accompanying text.

[59] 104 S. Ct. at 860.

[60] *Id.* at 860-61.

[61] *Id.* at 860. The Court stated that it refused to believe that Congress would initially invoke the commerce clause power in creating the right to enforce an arbitration provision and then limit that right to be applied exclusively in a federal forum. *Id.*

[62] *Id.* Federal courts hear approximately 2% of all civil litigation brought in the United States. *Id.* at n.8.

arising under the jurisdiction of the federal courts.[63] The Court concluded that since the California Supreme Court held unenforceable the contract to arbitrate claims under section 31512 of the California Franchise Investment Law, then the state statute contravenes section 2 of the Federal Arbitration Act and violates the supremacy clause.[64]

In a dissenting opinion, Justice O'Connor, joined by Justice Rehnquist, argued that since section 2 of the Federal Arbitration Act fails to indicate explicitly which courts must apply its rules, the majority incorrectly assumed that both federal and state courts must apply section 2.[65] In addition, since the 1925 Congress believed that the Act was a procedural statute[66] and relied partially on its article III authority over federal court jurisdiction in the Act's creation,[67] then Congress intended section 2 to apply only in federal actions.[68] Even assuming that section 2 of the Act creates federal substantive law applicable in state courts, the state courts should be allowed to apply their various enforcement procedures.[69] Furthermore, since sections 3 and 4 of the Act, which implements its application, refer only to federal courts, then the Act should control federal proceedings exclusively.[70] In con-

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[63] *Id.* at 860-61.

[64] *Id.* at 858. Congressional enactment of § 2 of the Federal Arbitration Act constituted a national policy promoting arbitration to decrease the states' ability to declare arbitration agreements to be unenforceable. *Id.*

[65] *Id.* at 864 (O'Connor, J., dissenting); *see supra* note 7 for text of § 2.

[66] *See* H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924)(enforcement of arbitration agreement is procedural issue); S. REP. No. 569, 68th Cong., 1st Sess. 2-3 (1924)(New York arbitration statute, on which federal Act was patterned, failed to change substantive law).

[67] 104 S. Ct. at 867 n.14 (O'Connor, J., dissenting). Justice O'Connor reasoned that in promulgating the Act, Congress relied on its authority to govern interstate commerce and maritime matters, its pre-*Erie* ability to create "general law" for federal courts, and its Article III power to regulate federal court jurisdiction. *Id.* at 867; *see Prima Paint*, 388 U.S. at 405 n.13 (congressional authority for passage of federal act was pre-*Erie* power to create general law for federal courts and its ability to control maritime and interstate transactions).

[68] 104 S. Ct. at 867 (O'Connor, J., dissenting).

[69] *Id.* at 868 (O'Connor, J., dissenting). Justice O'Connor noted that the Court failed to identify any procedural remedy other than specific performance of the agreement to arbitrate. *Id.* at 868-69. Traditionally, state courts could invoke their individual procedures to enforce a federal right. *Id.* at 869. Other possible remedies besides specific performance include damages and sanctions against the breaching party. *Id.* The case should thus be remanded to the state court for implementation of remedial procedures. *Id.* at 870.

[70] *Id.* at 864 (O'Connor, J., dissenting). Section 3 of the Act deals with suits "brought in any of the courts of the United States . . . ." 9 U.S.C. § 3 (1970); *see supra* note 18. Similarly, § 4 allows a party to "petition any United States district court" for an

clusion, Justice O'Connor reasoned that since the Act makes federal courts "equally accessible" to both parties in a suit, then the majority's concern over forum shopping is unnecessary.[71]

The Supreme Court implied in *Prima Paint*[72] and expressed clearly in *Moses H. Cone* that state as well as federal courts must employ the substantive law of the Federal Arbitration Act.[73] In *Southland Corp. v. Keating*, the Court for the first time required application of the Federal Arbitration Act in a state court action, finding that a conflicting state statute was preempted.[74] Consequently, states with arbitration statutes of narrower scope than the federal Act must disregard their own law and apply the federal law in state court actions.[75] Uniform application of the Act prevents forum shopping by establishing the federal law as controlling in both state and federal courts.[76] Such uniformity promotes the legislative intent of encouraging arbitration since the Act favors arbitration agreements.[77] Finally, the decision offers relief of congested court dockets by making more accessible this method of dispute resolution.

Janet Lee Herold

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order to compel arbitration. 9 U.S.C. § 4 (1970); *see supra* note 19. Justice O'Connor observed that the majority opinion implied that state courts must employ § 3 procedures. 104 S. Ct. at 864 (O'Connor, J., dissenting).

[71] 104 S. Ct. at 870-71 (O'Connor, J., dissenting). In a case where federal court jurisdiction is based on diversity and the party resisting arbitration files in state court, the party in favor of arbitration can invoke § 4 to get a federal order compelling arbitration. *Id.* at 870. In a situation with incomplete diversity between the parties, neither party has access to federal court. *Id.*

[72] *See supra* notes 44-49 and accompanying text.

[73] *See supra* notes 54-55 and accompanying text.

[74] 104 S. Ct. at 859-61. Both *Prima Paint* and *Moses H. Cone* were federal court actions. *See supra* notes 46, 51 and accompanying text.

[75] 104 S. Ct. at 859-61. Some state statutes allow parties to submit to arbitration *existing* controversies but are silent on—and presumably disfavor—the enforceability of agreements to submit *future* controversies to arbitration, thereby contravening the Federal Arbitration Act. *See, e.g.*, ALA. CODE §§ 6-6-1 to -2 (1975)(parties to any controversy may submit to arbitrators); KY. REV. STAT. ANN. §§ 417.010 - .011 (Baldwin 1983)(same); NEB. REV. STAT. § 25-2103 (1979)(same); N.D. CENT. CODE § 32-29-01 (1976 & Supp. 1983)(same); W. VA. CODE § 55-10-1 (1981)(same). Other states have enacted legislation upholding enforceability of some agreements to arbitrate future disputes. *See, e.g.*, MISS. CODE ANN. § 11-15-103 (Supp. 1983)(agreement to arbitrate future disputes valid, enforceable, and irrevocable). The Vermont legislature has failed to promulgate a commercial arbitration statute; consequently, the courts adhere to the common law rules of arbitration. *See, e.g.*, R.E. Bean Const. Co. v. Middlebury Assoc., 139 Vt. 200, 428 A.2d 306, 311 (1980)(arbitration agreements revocable until award rendered).

[76] *See supra* notes 24-27 and accompanying text.

[77] *See supra* notes 17-19 and accompanying text.

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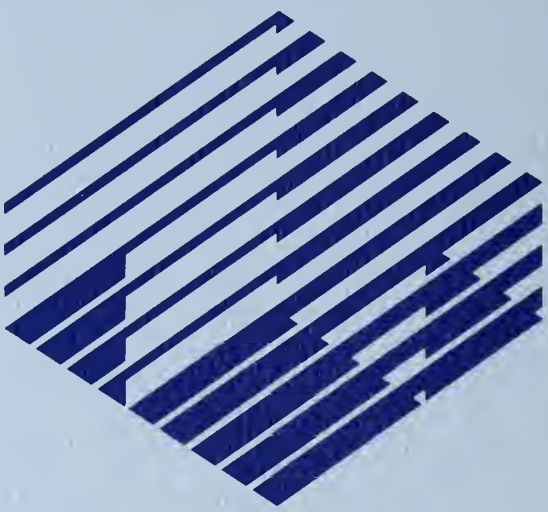

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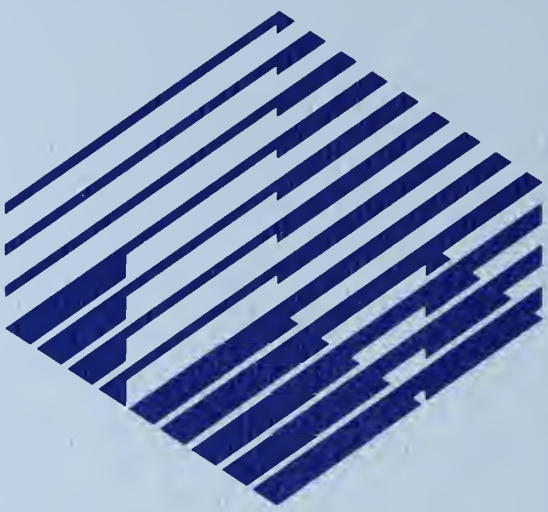

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